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81-2188

No. 81-.....

In The

Supreme Court of the United States

October Term, 1981

THE STATE OF MONTANA, et al.,

Petitioners,

vs.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, et al.,

Respondents.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Attorney General for
the State of Montana

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Counsel for State of Montana
(and counsel to be served)

(Additional counsel on inside cover)

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

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APPENDIX A

Petitioners represented by CALE CROWLEY, CROWLEY, HAUGHEY, HANSON, TOOLE & DIETRICH

Consolidation Coal Co.
Gulf Oil Corporation
Jeans Fork Cattle Co.
Montana Power Company
Philbrick, Newell and Rita R.
Roman Catholic Bishop Off.
Roman Catholic Bishop of Great Falls
St. Labre Mission
Banderob, F. C.
Bureau of Catholic Indian Missions
Daum, Irma M.
Davison, William H.
Downs, Robert F.
Fowler, Muriel F.
Herren, Joe
Hoehne, Mary G.
Kemph Land & Livestock Co.
Korber, Eileene J.
Kolb Brothers Corp.
Kolb, O. A.
Mottram, Geraldine R.
Murphy, Maurice Estate of
Roberts, Frances E.
Roberts, Victor R.
Ruff, Lillian
Shaules, D. K.
Siewart, Edward
Soap Creek Cattle Co.
Sullivan, Kathleen P.
Thompson Realty Co.
Thornton, Royal J.
Trask Cattle Co.
Walker, Virginia B.
Walter, Frank
Wilson, Archie & Sons, Inc.
Wilson Land & Cattle Company
Donald W. Berry
Archie Lewis
Joann Marlenee
Ronald C. Marlenee
Robert E. Olson
The Town of Culbertson
Arthur Boyum
Arlo M. Anderson
Linda R. Bellanger
Mina R. Belson
Allen V. Bummer
Catherine Darchuk
Caroline E. Davis
Raymond Garberg
Richard Gaustad
Richard G. Handy
Cox, Taylor
Hammond, George J. and JoAnnetta
Peabody Coal Company
Province of St. Joseph of the Capuchin Order
Quarter Circle U Ranch
Shell Oil Co.
Ballensky, A. G., Co.
Blake, Georgia H.
Daum, William V.

Downs, Gladys
Fowler, John Elisha
Gallup, Deborah D.
Herren, Opal G.
Kratochvil, W. James
Kolb, Clara
Krieg, Frederick C. and Lottie J.
Paquette, Gardena
Ruff, Joseph H.
Scott, John R.
Shaules, Frances V.
Siewart, Walter
Swihart, Charles R.
Thornton, Mildred W.
Torske Farm, Inc.
Vale Creek Ranch, Inc.
Walter, Clarence
Walton, William H.
Wilson, Archie Lee
William O. Berry
Dale H. Marlenee
Lanny P. Marlenee
Oscar W. and Lucille M. Olson
Tarum Farms, Inc.
Beulah I. Smestad
Anna Lee Boyum
Alfred A. Bellanger
Evan K. Benson
Leonard Bummer
Marlene Bummer
Tom W. Davis
Jesse C. Crury
Echo Garberg
I. H. Halverson, a/k/a Irwin Halverson
Alma G. Handy
Glenn Hanrahan
Hellickson Brothers, Inc.
Bernard Langer
Winifred M. Lien
Edna B. Murphy
Melvin Thunem
OrLynn C. Vois
Carloyn Wilcoxon
Fladager Enterprises, Inc.
Bertha M. Gustitis
Ralph W. Susag
Sundby Enterprises
Eleanor Teigen
Fay Taylor Phillips
Charles Andrilenas
City of Plentywood
Dale Fellon
Howard J. Holtan
Noel L. Sundheim
Thornwood Corporation
Lowell O. Burgett
Harold E. Hammerberg
James C. Hanrahan
Lee Ranch, Inc.
Ruth M. Matson and Arthur J. Matson
Norma H. and William D. Alexander
B. Eveyln and Wilford R. Casterline
Mildred E. Christofferson
John H. and Nella R. Dethman
Fay Crusch Ranch
Lewis H. Gobbs
Beverly Gray
Helena Harvey
Henry Hoye
G. Edward Johnson
Dora E. Johnson

Dora and Knud Knudsen
Eugene and Lila J. Larsen
Eileen V. and Glen L. Larsen
Mattelin Hereford Ranch, Inc.
Dorothy M. and Ove Nelson
Gerald E. Olsen
Letty Peterson
Lawrence D. Romo
James and Ramona H. Ross
Alice M. and Morris J. Royan
Carolyn M. and Robert L. Smith
Theodore O. Thompson
Lula B. Traeger
H. H. Wheeler
William Harmon Farms, Incorporated
Robert P. Wilson
Lillian Hatfield
Martin L. Reyner
Nelson Ranch, Inc.
Eldon S. Picard
Big Muddy Grazing Association
Martha Anderson
Lewis Archambeault
Miner Farms, Inc.
Jack G. Shanks
David G. Hanrahan
Ruth Hanrahan
Martin Johnson
Bernard L. Lien
Chester N. Murphy
Odegaard Land & Livestock Co.
Dorothy Thunem
Sheridian Wilcoxon
Joyce E. Chapman
Charles M. Gustitis
Hazel V. Rheault
Clarice M. T. Susag
Palmer E. Teigen
Richard M. Anderson
Victor DeTienne
Alice Fellon
Lois P. Holtan
Barney and Marian Simonson
Bertha Sundheim
Herb Korf
Fernande Fugere and Adrienne Hope Fugere
Delores Hoversland and Wilhelm Hoversland
O & R Ranch
Paulsen Bros.
Darold V. and Linda J. Anderson
Duane E. and Rosemary A. Christofferson
Delores J. Engelke
Howard L. Gobbs
Alice C. and Albert R. Granley
Dean Harmon
Jim Hatfield
Paul L. and Sylvia J. Hoffman
Gustav E. Johnson
Ray Johnson
Janice (Jane) E. and Wayne C. Knudsen
Alvin O. and C. Josephine Lien
Joseph F. May
Donald Oelkers
Paul and Sophie Panasuk
Herbert W. Picard

Norman A. Ronning
Nellie E. and Fred Ross
Royan Ranch, Inc.
Arthur Swanson
Daniel and Gladys M. Tietz
Wheeler-Bartley Ranch, Inc.
Frederick T. Wix
Mabel H. Wilson
Walter S. Young
Irwing Hoye
James Robert Traeger
Leota Hoye
Town of Bainville
Chinook Swindle
Helen Archambeault
G. T. Archambeault
Lund Hereford Ranch, Inc.
James L. Shanks
Golden C. Birkowski
Louise Christiana
Winnie Davis
Hansen Farming Co.
Gary Klind
Matador Ranch, Inc.
Eugene R. and Idell R. Nichol
Homer V. Peters
Valley County
Norheim Farming Corp.
John Dietrich, Jr.
William F. Anderson
Bi-Lo-Ji Farms, Inc.
Canen Ranch, Inc.
Emma and Graydon Edwards
Thomas J. Fisher
Vivien M. Foust
Funk Ranch, Inc.
Melvin Jensen
Lloyd L. Jones
Lacock Bros, a partnership consisting of Sherman Lacock and Jessie L. Lacock, Jr.
Walter K. and Frances C. Newton
Thomas R. and Lucille P. Rice
Sunnyside Golf
Sandra D. and Leonard B. Swenson
John Walton, owner of part of old Glasgow Angus Ranch
Meadowlark Land & Cattle Co.
Boucher Ranch, Inc.
Mitchel J. Etchart
Paulette Jakanoski
Nancy Etchart
Danielle Anderson
Denise Etchart
Brian Etchart
Otto Baltrusch, Jr.
Arthur O. Beirwagen
Beirwagen Farms
Lois V. Veirwagen
H. H. Bitz
Ronald A. Bitz
Hugh D. Dumas
Margaret A. Flaskerud
Ross H. Friede
City of Havre
Heart-Bar-R Inc.
Lloyd D. Kaercher
Helen A. Kanning
John B. Kuhr, Trustee
Paul J. Kuhr
Lewis M. Lineweaver
Joan Olson

Russell T. Olson
Scheele Ranch, Inc.
Dorothy Ann Solomon
Clifford Springer
Raymond W. Tow
Louise Clack Wigmore
Audrey E. Cox
Lee Cronk
Richard Cronk
E-T Ranch Co.
Nicholas B. Faber
Robert W. Finke
Beverly A. Fisher
Lillian B. Graham
Earl A. Britsch
Donald Davenport
City of Glasgow
Edith Kappel
Leonard H. Langen
Joyce J. F. Miller, a/k/a Joyce J. Ferguson
Mabel Soper Estate
Berniece M. Wolf
Jerome C. Hammond
Beil Ranch, Inc.
Bernice M. Boreson
Helen and Albert Craig, Jr.
Lee Edward Ellsworth, Lee Elsworth, Jr. and Katie Elsworth
Hinsdale Livestock Co., Inc.
Dewey and Helen Johnson
Dorval Kittleson
Harold and Edna Luraas
McIntyre Ranch
Floyd Nelson, Jr.
John Porteen
Mary Shipp
Swanson Ranch, Inc.
Guy E. Wagner
Gerald Fossum
Frank D. Stuber
Hughes Ranch, Inc.
Black Ranch, Inc.
Mark S. Etchart
Rita Gallagher
Paul Etchart
Colette Stebleton
Diane Etchart
John C. Rorvik and Donna J. Rorvik
William H. Baltrusch
Emma P. Beirwagen
June L. Beirwagen
Elizabeth J. Bitz
H. H. Bitz Land Co.
Thomas W. Connolly
Olive M. Dumas
Lacene M. Friede
Howard W. Hammond
Havre Lodge No. 1201 B.P.O.E.
Joseph H. Heavey, Jr.
Lorn H. Kaercher
Beverly L. Kuhr
P. Kuhr (for Havre Irrig. Co.)
Peter J. Kuhr
Edward F. Olson
Marjorie V. Olson
Curtis A. Reum
Estate of Mildred Sollien
Edmond C. Solomon
Carrie L. Tow
William B. Verploegen
James W. Barber & Sons, Inc.
Robert J. Cox
Cronk Ranch, Inc.
Leonard Drugge
Faber Cattle Co.
Patricia Faber

Ben P. Fisher
Charles A. Graham
Elvard S. Hedstrom
Ben F. Hofeldt
Douglas F. Hofeldt
Roy L. Hofeldt
James E. Jenks
Dorothy May Knudson
Aaron B. Lacox
Benjamin H. Math
Meissner Ranches, Inc.
Flora M. Paulson
Walter Paulson
Ray C. Ramberg
Hazel E. Rolston
Frances H. Schafer
Olive M. Sheppard
Webster Thackery
Thaine Warren, Trustee
Rolland Wirt
William W. Young
Leonard F. Zellmer
Virgil Jurenka
Norris W. and Opal C. Harrison
Harold Jensen
Klingler, Inc.
Charles and Dorothy Lineweaver
Ethel V. McSloy
Fred and Sylvia L. Mohar
Betty Ann and James K. Nemetz
Warren Ross
John T. and Mary Ann Stevenson
Marion Wilson
Clark A. Hofeldt
Rodney B. Hofeldt
JMS Ranch, Inc.
Thora Finke Jennings (Allderdice)
Neil Looby
Meissner Brothers
John G. Overcast
Harold J. Paulson
Erna Ramberg
Red Rock Land Corp.
William D. Ross
Dale J. Sheppard
Darrell W. Swick
Turner Colony
Gloria Wirt
Una M. Young
Doris A. Zellmer
Anderson Land Co.
Estate of George C. Blackwood
Ila M. and Wilbur J. Hensler
Ole Jensen
William Hinebauch
Marilyn J. Lybeck
Berg-Melby Corporation
Estate of Edward Molitor
Louie Petrie Ranch
Andrew and Loretta P. Schwan
Arthur John Tilleman
Helen A. and John W. Young

Petitioners represented by MAURICE R. COLBERG, JR., HIBBS, SWEENEY, COLBERG, JENSEN & KOESSLER

Ahern, Raleigh I.
Alexander, Mary Ann
Anderson, Richard J.
Ashenhurst, Gene and Dorothy H.
Ashenhurst Ranch, Inc.
Baber, Sadie F.
Ball, John D.
Bird, Julia A.
Bumgardner, Eva
Baker, Verna S.
Bird, Harold W. and Anna M.
Benge, Dale V.
Bumgardner, Charles H.
Burnsides, Hazel
Bumgardner, George
Batey, Ray and Jane Doe
Bug Ranch Co.
Butts, Calvin H.
Baber, George P.
Bird, Anna M.
Butts, Joy
Burnsides, Wayne, estate
Brown, Albert, Jr.
Curran, Joe W.
Canyon Creek Cattle Company
Clark, Walter L.
Coykendall, Eltha Muriel
Clark, Walter and Jane Doe
Clark, Elizabeth D.
Curran, Helen E.
Giesecke Bros.
Giesecke, Richard W.
Giesecke, W. Ralph
Green, Michael
Golder, Nick
Harvey, Frank D. and Rino
Holmes, George B. and Dixie L.
Howard and Son, Inc.
Hana, Alice
Hanna, Richard R. and Alice
Harwood, Hubert
Hogan, Richard Lane
Hollowell, Newton A. and Bessie C.
Horizon Equipment Co.
Hutchison, Richard A.
Cotten, Ellen E.
Combs Ranch, Inc.
Carey, Norman
Dodds, J. E.
Davis, W. M. and Mary Lou
Davidson, Mrs. Verdie P.
Darran, Clair and May E.
Dean, Walter B., Jr.
Dent, Joe S. and Delores L.
Doak, Deming
Dodge, Carl A.
Davidson, George
Elder, Alexander B.
Finlayson, Harry R. and Phoebe Ann
Fjell, Elmer
Fletcher, Ted or Peggy
Flowers, William R.
Forman, Ralph L.
Frankl, Bert
Fulmer, Genie Philbrick
Fessler, Eugene

Fletcher, Gladys
Fox, Elsie R.
Flowers, Mabel C.
Frette, Raymond N.
Fletcher, Vern
Faddis-Kennedy Cattle Co.
Flowers, John L. Estate
Fortune, Marilyn
Fortune, Vern
Frette, Noreen
Golder Ranch, Inc.
Greenwood, Russell E.
Gresens, Neal L. and Irene
Groom, Thurman
Garfield, Russell and Genie
Green, Kirk and Dorothy
Greenwood, Carol S.
Hayes, Perry W.
Howard, Robert L. and Ingeborg
Hope, Edwin E.
Harstadt, John and Jane Doe
Harwood, Hubert
Hunt, H. L.
Hunt Oil Co.
Hults, Ralph M.
Hardy Land & Livestock Co.
Harstad, Eleanor A.
Hutchison, Dorothy
Janson, Betty R.
Jordan, Ruth
Jones, Charles A.
Jones Bros. Livestock Co.
Johnson, Arienne
Johnson, Torrey B.
Jones Land and Livestock Co.
Jones, Helen M.
Kirkemo, Harold
Knobloch, Jack
Knobloch, Albert
Knobloch Bros.
Kennedy, J. R. Porter
Kennedy, Robert S.
Ladson, Roger
Landers, H. D. and Margaret
Larsen, Chester
Larsen Ranch
Larsen Land and Livestock
Lenyard, Carl W. and Katherine
Lange, Francis H. and Jean A.
Leatherberry, Alfred and Maxine
Lee, Robert A. and Evelyn M.
Lei, James E. and Jeannette
Lee, Bonnie M.
LeVeque, P. V.
Larson, Chester and Jane Doe
Lange, Frank and Jane Doe
Lodson, Roger G.
Lodson, Sherryl
Lanjohn, Patricia Davidson
Lei, Oral, Ranch, Inc.
LeVeque, Evangeline M.
LeVeque, Mary P.
Lockie, John, Ranch, Inc.
Mathis, James S. and Catherine
Mees, Dora
Mees Hereford Ranch
Miller, Gladys B.
Miller, Jesse J.
Moffitt, James L.

Morgan, L. C.
McFarland, William C.
McFarland, Mickey and Marcia
McFarland, Hugh C.
McKelvey, Glenn and Eva
Mann, Ruth Alberta
Mobley Ranch, Inc.
Murry, W. D.
Murry, Jack R.
McFarland, Lynn
McLean, Bruce
Markland, Charles H. and Nellie
Martin, Donald R.
Mobley, Herbert O., Jr.
Mobley, John R.
Mees, LaVon, Trustee
Moreland, Elta M.
Moreland, John W., Jr.
Morgan, E. S.
Mees, Mark C.
Moffitt, Phyllis B.
Nance Cattle Company
Nansel, Arlo and Ruth M.
Nixon, Robert and Maxine
Ochsner, Jay Donald and Fern
Orr, Alice
Orcutt, J. Bruce
Ostrom, Mary Jane
Ochsner's Inc.
Orcutt, Dezzie M.
Philbrick, Newell B. and Rita R.
Phillips, Carl
Popp, John W. and Nell I.
Powell, Keith B.
Polich, Arthur W.
Parkins, Charles F.
Perry, D. L.
Philbrick D K Ranch, Inc.
Phillips, Patricia A.
Phillips, Ruth
Polich, Vesta L.
Phillips, H. I.
Petre, Preston
Petre, Stuart O.
Parking, Charles Finley
Ravenscroft, Francis J.
Rash, Marion
Ramer, Sydney L.
Rue, Judy A. and Victor
Randolph, Edmund
Schoonover, John H. and Agatha
Snider, James W.
Snodgrass, Albert and Alice
Star Printing Company
Sterling, Donald and Daisy
Sufficool, John E.
Schroeder, Josephine
Sorenson, Leland
Stanley, Don
Sprague, Jean H.
Sprague, Hulda
Shook, Glen E. and Laurel
Smith, Larry and Dorothy
Shaudel, Robert G.
Shy, Robert J. and Anna M.
Severson, Geo S. and Marjorie R.
Steadman, Alvin
Soukup, Betty Lou
Schaudel, Robert G.
Shaver, Boyd
Shaver, Marian E.
Snider, Merle Estill
Spear O Ranch Company

Stanley, Richard R.
Stuart, Peter
Steadman, Josephine
Stanley, Raymond L.
Saddler, R. J.
Saddler, Mable S.
Tongue River Electric Cooperative
Trusler, Inc.
Trusler, William C.
Trusler, L. D. and Adaline
Trusler, William C.
Terrett Ranch, Inc.
T Triangle Ranches, Inc.
Taylor, Walter J.
Thompson, O. and Mildrid
Thompson, Sigurd
Tongue River Water Users Association
Trainer, Jesse F and Fern
Turner, David S. and Patricia
Tennant, Jean E.
Trusler, Jacqueline
Trusler, Woodrow W.
Taylor, Shirley H.
Taylor, Walter J.
Thompson, Sigurd
Terrett, Julian, Jr., Trustee
Tongue & Yellowstone Irrigation District
Viall, Lilian H.
Valentine, Christine S. J.
Van Elsen, Monica
Waldie, Ervin A.
Williams, E. L. (for Goldie)
Wimer, Tom and Donna
Wood, Eugene
Woodard Ranches, Inc.
Weinburg, Harry
Wells, Wesley and Evelyn
Wilson, Carl C.
Wetherelt, Francis and Vera Lei
Ward, Willis, Inc.
Williams, William O., deceased
Wood, Mae
Younglund, Dennis
Zier, William D.
Zimmer, Max
Zimmer, Walter
Zier, Alice L.
Allen, E. O.
Allen, Edna
Allen, C. M. & Son
Allen Cattle Company
Alderman Co., Inc.
Barnard, Katherine
Brown Cattle Co.
Brown, Willie B.
Bailey, John L.
Broadus, Inc.
Broadus, Margaret C. c/o Hugh W. Broadus
Carpenter, Marjorie Irene
Carey, Del
Charles Wood Ranch, Inc.
Colvin, Dorie Lou
Choate, Alice
Cain, Wreatha
Cain, Oscar Donald
Cain, Gladys
Dent, Joe S.
Dent, DeLores L.
Dent, Ricki J.
Double H Ranch, Inc.
Dunning, James B.
Dunning, Elsie M.
Dalzell, D. H. as to the rights of Ray Smith
Ellis, Lulu F.

Egan Ranch, Inc.
Egan, Minnie R.
Elsen, Monica Van
Freestad, Gus
Freestad, Helena
Isaacs, Flora
Kolka, Arthur
Kolka Cattle Company
Love, Doris Lukes Estate
L. J. Green & Sons, Inc.
Muggli, Hugo
Muggli, Cecilia
McLean, Bruce
Newcomer, Ola Lue
Rice, Signa Woods
Ravenscroft, Francis J.
Ravenscroft, Martha
Ravenscroft Cattle Co.
Swope, Jack A.
Swope, Wanda J.
Schiller, Herbert Allen
Schiller, Vera Jean
Shy, Mae R.
Shy, George Porter
Shy, Eva Rose
Smith, Ray
Terrett, Julian, Jr., Trustee
Terrett Ranch Inc.
The Failings, Inc.
Todoroff, John
Wiltse Cattle Company
Woods, Elvy M.
Whitbeck, George W., as to the interest of Gladys Sad
Wood, Merle E.
Wood, Francis M.
Wegner, Elsie A.
Yager, Joseph J.
Zook, Thomas F.
Zook, Isabel
Barkemeyer, Ralph, also known as Ralph W. Barkemeyer
Crosby, Ethel, Trustee, individually and as successor of the estate of C. A. Lewis, Jr., deceased
Crosby, Rodney, Trustee, individually and as successor of the estate of C. A. Lewis, Jr., deceased
Crosby, Rodney W.
Crosby, Rodney, Sr.
Crosby, Ethel
Crosby, Ethel Lewis
Crosby, Rodney L.
Faddis-Kennedy Cattle Company
Gibson, William K.
Gibson, Lowell C.
Hibbs, R. P.
Hunt, N. B.
Kennedy, J. R. Porter
Kennedy, Robert S.
Manning, Dave, whose name erroneously appears as Manning, Bradbrook and Manning, Verhelst, successor to Big Horn Project, Inc., a dissolved corporation, and

Big Horn Tullock District Company, a dissolved corporation, which is erroneously named Bighorn Tullock Project, as to which corporations defendant Ed Verhelst, now deceased, was also a successor

Mill Iron Cattle Co.
Roods, Darlyne L.
Roods, Eva May
Roods, Louis R.
Roods, Mildred J.
Roods, Robert
Roods, Susan R.
Willcutt, William J.
Koss, Adam
Koss, Lee
Koss, Virginia L.
First Continental Corporation
Kingsbury Ditch Co.
Glacier Park, Inc.
Cloverdale Ranch, Inc.
Aasheim, Velma
Aggen, Arvid & Linda L.
Anderson, Oliver & Florence
Ator, Harvey & Mary K.
Bergh, Beatrice & Quentin
Brookman, Marvin H.
Bucklin, Frank W., Jr. & Catherine Murray
Bolster, Lloyd
Bowers, L. & Ruth J.
Boysun, Steven
Barsness, Richard K. & Susan
Brown, Marjorie L.
Berry's Land & Livestock
Collins, Kenneth D.
Carroll, Ferestad, Inc.
Chabot, Dale E. & Elaine L.
Chabot, Amedee & Margaret
Camrud, Iver
Danelson, Julian C.
Darvis, Gerald A.
Darland, Tom
Eggen, Eugene
Fouhy, Anna Belle
Fouhy, Francis George
Fouhy, Edith Pearl
French, Robert D.
Freske, Robert
French, Glenn L. & Harvey E.
Friedrich, Donald A.
Frederick, Hattie
Hatfield, Eugene & Ruth
Herman, Harry M.
Hjort, Alice
Hedges Corporation
Harriet, Alfred C.
Hanson, Vernon
Hancock, Vern T.
Holji, Shirley D. Harris
Holen, Kenneth
Hoversland, Andreas
Hoversland, John B.
Handran, James W.
Holen, Lloyd & Doris M.
Jacobson, John
Johnson, Lester G.
Johnson, Melvin O.
Johnson, Rudolph L.
Johnson, James H. & Bernice
Johnson, Gerhard Y. & Helen B.
Johnson, Roger W. & Margaret

Johnson, Archie
J Bar E Ranch
Johnson, Keith E. & Linda M.
Kisler, James G. & Cherie
Larsen Farms, Inc.
Lodahl, Niels A., P.R. for Frank Bast & Lillian Jorgensen Bast, Decd.
Lund, Anna Jansen
Lee Ranch, Inc.
Lee, Ernst M.
Lund, Hereford Ranch
Lee, Aldon E. & Rita R.
Lund, Robert L.
Lien, Orphy A. & Birdell C.
Medders, Elsie A.
Murray, Dale & Catherine
Medders, Lila
Munz, Glen & Alberta E.
Martin, Eugene J., Loretta C. & Allen A.
McCann Ranch, Inc.
Middagh, Robert W. & Willie Lou
Marottek, Frank & Mertice M.
Nash Brothers
Nelson Angus Farms
Nelson, C. W. & Sons
Overby Agribusiness, Inc.
O'Conner, Richard K.
O'Conner, Leo & Jean M.
Pittenger, Annette
Petersen, Sigrid O.
Pratt, Kenneth W.
Pratt, Willie O.
Paulson, Gene & Frieda C., P. R. for Gilbert Paulson, Decd.
Pickthorn, Lyle & Anna E.
Reed's Border Polled Hereford Stock Farm, Inc.
Romo, Lester V. & Catherine S.
Reinhart, James L. & Reita D.
Richardson, Robert & Dorothy
Sorenson, Michael & Steven
Sundsted, Helga Doris
Shipstead, Milton
Tade, Inc.
Twedt, Henry
Twedt, Knute
Tange, John K.
Thompson, Gordon C.
Thomsen, Elsine
Tollefson, David & Bernice W.
Traeger, James Robert
Voxland, Tommy R. & Luella M.
Wilcoxen, Alice
Wilcoxen, James
Wang, Ole E.
Warmbrod, John, Myrtle & Lela
Wall, David A. & Agnes
Wolf Point, City of
Zimmer, John, Jr.
Zimmer, Thomas & Delores

Petitioners represented by BERT W. KRONMILLER and JAMES E. SEYKORA

Mr. Ivan Abel
Mr. & Mrs. Carlyle Arndt
Mr. Charles W. Avery
Mr. & Mrs. Donald Bell
Mr. & Mrs. Harold Benzel
Mr. A. G. Bird
Mr. & Mrs. Earl Bauman
Mr. & Mrs. Arden F. Blair
LaVerne Bomar
Mr. & Mrs. Chester Bounous
Bozeman Trail Ditch Company
Campbell Farming Corporation
Mr. Lloyd Carper
Chimney Creek Ranch
Mr. Jack Colstad
Mrs. Helen Cummings
Mr. & Mrs. Robert Dewald
Mr. Jay Dooley
Mr. & Mrs. Carl Dorn
Mr. & Mrs. George Dorn
Mr. & Mrs. Larry Dorn
Mrs. Gladys Downs
Mr. & Mrs. Otto Dringman
Mr. John Dudis
Mr. Albert Eckman
Mr. August Elhard
Mr. LeRoy Enzminger
Mr. Charles Finley
Mrs. Helen S. Fisher
Mr. George Fly
Mr. & Mrs. Harvey Fox
Mr. John Gentry
Mr. & Mrs. Robert Greenwalt
Grocers Realty Corporation
Mr. & Mrs. Robert Harlin
Mr. Gill Harris
Mr. & Mrs. Walter Havener
Mr. & Mrs. William Herbel
Mr. & Mrs. Albert Herman
Jenny Tuggle Hiber
Mr. Joe E. Hope
Mr. & Mrs. William Kern
Mr. & Mrs. John Kincaid
Mr. & Mrs. John Kukes
Mr. & Mrs. Robert Kukes
Mrs. Grace D. Lammers
Mr. & Mrs. Jack Laughery
Mr. Arthur Lee Laughery
Mrs. Margaret Seaton Libby
Mr. Fred Lind
Mrs. Regina Lind
Mr. & Mrs. John Lind
Mr. & Mrs. Gustav Maack
Mallard Land Corporation
Mr. Speros Manolis
Mr. & Mrs. Vernard Melville
Mr. & Mrs. Ray Morissette
Mr. Casey Munter
Mr. Leonard Munter
Nayematsu Brothers, Inc.
Mr. Chester A. Nayes, Jr.
Mr. C. A. Nayes and Mildred E. Nayes
Mrs. Laura Nepper
Mr. Donald Orchowski
Mr. Juell Ottun, Inc.
Mr. Walter Patterson
Mr. & Mrs. Pete Pattyn
Mr. Elmer Paulson
Mr. & Mrs. Vernon Pegram

Mr. & Mrs. Coil Redding
Mr. & Mrs. Lawrence Rider
Mr. & Mrs. Fred Schmidt
Mr. & Mrs. Fred Schneider
Mr. & Mrs. Johnny Schneider
Mr. & Mrs. Adam Seader
Mr. & Mrs. Henry Seder, Jr.
Mr. Kenneth Seder
Shirasago Farming Corporation
Mr. & Mrs. Walter Sielensky
Mrs. Avis Slattery
Mr. Albert J. Steen
Mr. & Mrs. Fred Stricker
Mr. & Mrs. Charles E. Sweeney
Mr. Sterling Torske
Mr. & Mrs. Lawrence Tuggle
Two Leggins Water Users Association
Mr. & Mrs. Cecil Tysver
Mr. & Mrs. Henry Uffelman
Mr. & Mrs. Charlie Vandersloot
Mr. & Mrs. Lambert Vandersloot
Dr. D. L. Van Zandt
Mr. C. C. Wagenaar
Mrs. Laura Ann Ward
Mr. Floyd Warren, Inc.
Mr. David Watson
Mr. William C. Watson
Mrs. Florence M. Wells

Petitioners represented by DOUGLAS Y. FREEMAN

Anita Angus Ranch
Atkins, Bonita
Atkins, Douglas
Bailey, Connie
Bailey, Donald Patrick
Bainter, Marie
Ball, Calvin J.
Barber, Catheryn
Barber, John W.
Barnes, Gary
Barnes, Marie
Bastrom, Floyd
Bastrom, Linda
Bastrom, Marie
Beck, Clarence
Beck, Theresa
Benzel, John
Benzel, Ruth L.
B. E. Ranching Company
Besel, John
Besel, Mary
Big Horn Low Line Canal
Big Horn Tullock Project
Blair, Mary Lou
Blair, William J.
Boehs, Barbara
Boehs, Richard
Bowman, John A.
Bowman, Martha A.
Boyce, Inc.
Boyce, Dee
Brown, Harriet C.
Brown, Murry J.
Brown, Murry
Brown, Murry J., Jr.
Brown, Murry, Jr.
Murry Brown Ditch
Brown, Ralph E.
Butler, Chester

Butler, Frank R.
Butler, June H.
Butler, Minnie
Cady, Bruce M.
Cady, Dorothy V.
Calvetti, Andrew A.
Calvetti, Gladys
Carlis, George
Carlton, Pete W.
Carlton, Sheila M.
Chauvin, Christine
Chauvin, Joe H.
Chavez, Evelyn Ann
Chavez, Frederick
Clawson, Dorothy
Clawson, John O.
Coleman, Lee L.
Conner, Clara A.
Connor, Jack B.
Cool, Ruth
Cooper, Dema L.
Cox, Audie May
Crawford, Doris Ann
Crawford, Madge
Crawford, William R.
Crilly, Anna G.
Criswell, Leslie
Criswell, Lucia
Criswell Ranch Company
Croghan, R. D. Development
Crum, George B.
Curry, Fern
Curry, W. A. (now deceased)
Dabney Angus Ranch Co., Inc.
Dabney, Gene
Dabney, Jean
Deines, Harry
Deines, Helen
Delp, Jack D.
Delp, Donna T.
Deneen, Helen
Deneen, Morgan
Denny, Gertrude D.
Denny, Sam E.
Devoure, Frances J.
Devore, Gordon L.
Dinsdale, Alfred E.
Dobkins, James L.
Dobkins, Sharon M.
Donnes, Adeline
Donnes, Frank
Door Key Ranch
Dudis, Dorothy
Dudis, John
Durden, Pat (Biggs)
Dygert, Clyde J.
Dygert, Leone
Dygert, Leone C.
Eagle Land Company
Easton, Elmer W.
Easton, Minnie B.
Eckroy, Goldie M. (now deceased)
Eckroy, Goldie Mary (now deceased)
Eggart, Helen
Eggert, Helen
Eggert Pump Ditch
Egnew, Charles
Egnew, D. L.
Ellis, Ervin D.
Ellis, Ethel
Ellis, Gerald H.
Eshleman, Emerson
Eshleman, Mary
Eshleman, Robert H.
Esp, Donna
Esp, Henry L.
Farly, Boyd

Farleys, Inc.
Faught, James
Faught, James J.
Faught, Myrtle
Fellows, Charles E.
Fellows, Heather W.
Fellows, Mary
Fellows, Walter
Fellows, Walter M.
Fisher, Agnes
Fisher, Roger Courtland
Fitzgerald, Genevieve N.
Fitzgerald, Jay
Fly, George R.
Fly, Roy
Foote, M. Gordon
Fox, Alex
Fox, Betty J.
Fox, Donald D.
Fox, Larry K.
Fox, Luella J.
Fox, Martha
Fuller, Lawrence S., Jr.
Fuller Ranch Company
Garney, Adell
Gentry, James E.
Gibson, Helen F.
Gibson, John B.
Giesy, Orlin C.
Graham, Carroll A.
Graham, NellyVette
Greenwalt, Roy
Gregory, Frank (deceased)
Gregory, John R.
Gregory, Mary R.
Gregory, Richard Alan
Gregory, Ruth
Grinsteiner, Betty L.
Grinsteiner, John M.
Gross, Erle
Hamilton, Gladys M.
Hamilton, Herman L.
Hamilton, J. S.
Hamilton Ranch
Hammond, Arlene E. L.
Hammond, Bert
Hammond, Lester
Hardin Meat Market
Hardy, Warren
Harmon, Anita M.
Harmon, Leo W.
Hartung, Katherine
Hartung, Robert
Hawker, Virginia Vesely
Hawks, Clyde, Inc.
Hawks, Clyde L.
Hawks, Dolly O.
Haynie, Patrick
Heitzman, Arlene M.
Heitzman, Larry G.
Heitzman, Walter
Henman Ditch
Herbel, Eve
Herbel, William
Hibnes, Barbara Marie
Hibnes, William Virgil
Holland, A. E.
Holland, Cecil Y.
Holland, Mildred
Hope, Alice
Hope, Carl B.
Hope, Rich
Hope, Walter
Hults, Irwin G.
Hults, Ralph M.
Hussey, Wylma (Flack)
Imer, Betty J.
Imer, Richard L.
Jabs, Mary
Jabs, Monte L.

Jabs, Reinhold J.
James, Mart V.
James, Shirley C.
Jeffers, Hale
Jeffers, Judith
Jeffers, Justine E.
Jeffers, Terry E.
Jeffers, W. Scott
Jeffers, Winfield
Jeffers, Winfield W.
Jeppesen, Helen L.
John, Kenneth F.
John, Madge Lucille
John, Madge R.
Johnson, Torrey
Kaiser, Anna Mehling
Kaiser, Arthur L.
Kaiser, Cecilia B.
Kaiser, Verne N.
Kan Sun Cattle Feeders, Inc.
Keeler, Clarence J.
Keeler, Selina N.
Kehler, Esther
Kehler, Mary E.
Kehler, Richard
Kehler, Richard, Sr.
Kehler, Richard L., Jr.
Keller, Benny
Keller, Eileen
Kelley, Edmund
Kelley, Ruth
Kemph, Erna R.
Kemph, Joe O. (actually Joe Q)
Kemph, Lawrence T. Jr.
Kenney, Stephen
Kenney, Stephen J.
Kenney, Steve
Kern, Mary J.
Kern, Harriet Dana
Kern, Robert Wayne
Kern, Wilbur W.
Kerns, Kenneth
Kerns, Kenneth D.
Kerns, Margaret
Kimmel, Jean
Klein, Kathleen
Kline, John
Kline, Madge
Koebbe Construction
Koebbe, Joe V.
Koebbe, Lawrence
Koyoma Farms, Inc.
Kreitzberg, Dean E.
Kreitzberg, Venita
Kronmiller, L. H.
Kukes, Jean Ann
Kukes, Robert L.
Kurtz, Ray E.
Lackman Farming Corporation
Lamar Ranching, a corporation
Lind, Fracine
Lind, Gregory D.
Lobo Cattle Co.
Luther, Delores E.
Luther, George F.
Lurther, John
Luther, John, Jr.
Luther, Joseph R.
Luther, Nancy C.
Luther, Stella
Lynde, Eleanor
Lynde, Myron
Maack, Floyd
Maack, Lillian
Maack, Tony
MacClean, Ed

MacClean, Ed
MacClean Ranch
Marshein, Robert L. (a/k/a Robert L. Margheim)
Marshein, Shirley R. (a/k/a Shirley R. Margheim)
Martinsen, Mary
Martinsen, Roy
May, Albert Estate
May, Charles
May, Virginia
McGovern, Francis M.
McGovern, John J.
Mehling, Bobby Lee
Mehling, Darlene
Mehling, Esther
Mehling, John
Mehling, John D.
Mehling, Marilyn
Miklovich, Helen (a/k/a Helene Miklovich)
Miklovich, Pete
Miller, Barry
Miller, Edna Mae
Miller, Edwin
Miller, Edwin A.
Miller, George C.
Miller, Harry H.
Miller, Katie Y. Estate
Miller, Margaret Torske
Miller, Shirley Ann Humphrey
Miller, Walter, Jr.
Miller, William Earl
Miller, Vela Mary
Millers Ditch
Millers, Inc.
Morrison, Columbia J.
Morrison, Joseph E. (now dec'd)
Moyer, Ethelynne
Moyer, Howard
Nedens, Edward
Nedens, Nancy
Nelson, Ernest L.
Nelson, Kathleen K.
Newhold, Frank
Newman, Guilford
Nichols, Millard S.
Noblett, Irene
Noblett, John
Noyes, Chrystal
Obie, Donald L.
Obie, Janis L.
Obie, Richard G.
O'Brien, Ruth E.
Ohmstede, Daryl D.
Ohmstede, K. Ann
Olenik, Andrea M.
Olson, Olive S.
Osness, Erling
Osness, Rose
Ottun, Esther L.
Ottun, Geraldine (Anderson)
Ottun, Raymond St. Clair
Overturf, Clemince W.
Overturf, Marilyn R.
Overturf, Roger
Owens, Jack
P & L Cattle Co., a corp.
Pattyn, Cyriel
Pattyn, Letty
Pease, Virgie
Perrin, Dorothy
Peters, Joe
Peters, Pauline
Petersen, Burke
Petersen, Yvonne

Peterson, Burke
Pilkington, Donald D. (deceased)
Pilkington, Elizabeth H. G. (now Lindsay)
Ping, J. J. (deceased)
Pitsch, Arthur
Pitsch, Connie A.
Pitsch, David L.
Pitsch, Harvey Lee
Pitsch, Ida
Pitsch, Irvin
Pitsch, Lavone Marie
Pitsch, Mary Ann
Pitsch, Mary Elaine
Pitsch, Pete
Pitsch, Peter
Pitsch, Reuben
Pitsch, Reuben C.
Pitsch, Robert S.
Pitsch, Sarah
Price, David N.
Price, Joy
Pryor Land Company
Quigley, Bernie C.
R & C Building, a partnership
Rassmussen, J. Philip
Reddin, Carolee
Reddin, William, Jr.
Redding, Mabel
Redding, Vella B.
Rice, Edward S., Jr.
Rogerts, Inc.
Rokita, John J.
Rokita, Wauneita
Romine, Betty
Romine, James
Rotten Grass Cattle Co.
Rule, Robert C.
Rule, Venita P.
Russell, George C.
Russell, Lola K.
Salveson, Cathy Lee
Salveson Pump Ditch
Salveson, Robert A.
Slaveson, Ira Burdette
Slaveson, Iva Burdette
Schaak, Adolph Duane
Schaak, Daniel
Schanaman, Lee Roy
Schanaman, Pearl E.
Schissler, Jerry
Schissler, Joan
Schissler, Lenice
Schneider, Alex
Schultz, Dorothea
Schultz, Jake
Schwend Ranch
Seader, Fred
Seader, Ruth
Shick, Herman L.
Shick, Lucyle
Shick, Lyle
Sjostrom, Lars J.
Sjostrom, Sadie L. (now deceased)
Slter, Bert
Slater, Martha
Smith, Evelyn Young (Wilson)
Smith, Raymond M.
Snively, Alta
Snyder, Lloyd
Snyder, Lloyd V.
Spear, Bradford J.
Spomer, Elizabeth
Spomer, Pete
Standish, Marie
Stark, Earl A.

Stark, Vernice
Steinmetz, Mary P.
Stevens, John
Stevens, John T.
Stevens, Sheryl M. Pease
Stimpson, Harold E.
Stimpson, Norma M.
Strecker Farms, a corporation
Stovall, Elizabeth T.
Sullivan, Bernadette
Sullivan, Humphrey
Swaby, Frances Mack
Thrower, Georgia
Thrower, Rex R.
Torske, A. L.
Torske, Andrew L.
Torske, Bernice
Torske Cattle Company
Torske, Mary B.
Torske, Robert
Torske, Robert T.
Torske, Rose E. (now deceased)
Torske, Walter C.
Torske, Walter Lyle
Triangle Motor Company
Tyler, Jocelyn J.
Tyler, Lyle B.
Uffleman, Helen
Uffleman, William
Valdez, Beverly R.
Valdez, Priscilla
Valdez, Roy
Valdez, Roy, Jr.
Van Cleve, Mary
Wagenaar, Grace M.
Wagner, Edward
Wagner, Martha
Ward, George D.
Ward, Patricia J.
Weber Farms, Inc., a corporation
Weinberg, Joseph J.
Weinberg, Katheryn
Weibert, Reuben
Weibert, Ruth
Westwood Cattle Company
Westwood Ranch Company
Wham, Claude
Whaley, Edward
Whaley, Elizabeth
Wheeler, Vera E.
Wightman, Evelyn
Wightman, Howard
Willett, Viola R.
Williams, Ennice V.
Williams, John A.
Willson, Evelyn
Willson, Virgil
Wolfe, Ellen T.
Wolfe, Ellen Tredway
Wolfe, Margaret
Zettle, Kenneth (deceased)
Ziler, Lawrence R.
Bailey, Donald P.
Bailey, Connie
Bailey, James N.
Bailey, Mary E.
Bar 69 Cattle Company
Barnes, Dewey
Brooke, Vennie Lane
Boyce, Inc.
Carlat, Ralph
Coates, Fern
Coates, George O.
Coates, Leslie E.
Coates, Shirley C.
Faddis-Kennedy Cattle Co.
Farley's Inc.
Fowler, Ruth E. Estate

Goodwin, Addie M.
Goodwin, Horace F.
Goodwin, Margaret
Greenleaf Land & Livestock Co.
Gregory, Mary Roush
Hamilton, James S.
Hamilton, James S., Jr.
Hamilton, Lois J.
Hanks, Anne T., now known as Anne T. Black
Hawker, Virginia Vesely
Holmes, Raymond
Hults, Irwin G.
Hults, Ralph M.
Jones Bros. Livestock Co.
Jones, Hugh O.
Johnson, Adrienne
Johnson, S. Torrey
Kennedy, J. R. Porter
Kennedy, Robert S.
Korbe, Mary Dufford, now known as Mary Knott
Lockie Livestock Company
Luther, George
Luther, Nancy
Miller, Walter, Jr.
Millers, Inc.
Muller, Simon
Morris, Alice Mae, now known as Alice Mae Fleming
Morris, Willis D.
Muller, Simon
Muller, Winnifred
Pease, Ida
Peterson, Burke
Peterson, Yvonne
Pierce, Almeda
Pierce, Joseph M.
Pierce, Jim
Pitman, George
Powell Cattle Company
Rocker Six Cattle Company
Rockman, Lillian Yarlott
Schaar, Dan a/k/a Dan Schaak
Schaak, John
Sheeley, Glenn H.
Sheeley, Glenn H. & Co.
Sheeley, Mary C.
Sheeley, Mary C. & Co.
Spear O Ranch Company
Sprague, Harold
Sprague, Virginia
States, Vernon J.
Straw, Alva E.
Straw, Vennie Lane
Swift, Robert E.
Swift, William B.
Watson, Hugh Lloyd
Watson, Lloyd Ronald
Westwood Cattle Company
Westwood Ranch Company
Westwood, Jack R.
Young, John

APPENDIX B

Lists of parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates for petitioner corporations, pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States.

CONSOLIDATION COAL COMPANY

E. I. duPont de Nemours and Company is the parent of Conoco, Inc. which is the parent of Petitioner Consolidation Coal Company. Affiliated domestic companies other than wholly owned subsidiaries are:

Sit-Con Oil Corporation
Colonial Pipeline Company
Pioneer Pipe Line Company
Platte Pipe Line Company
Seaway Pipeline, Inc.
Syngas Company
Mathies Coal Company
Bishop Coal Company
Itmann Coal Company
Pelix Oil Company
Long Beach Oil Development Company
Yellowstone Pipe Line Company
Dixie Pipeline Company
Petroleum Terminals Incorporated
West Shore Pipe Line Company
Southern Facilities, Inc.
Lake Charles Pipe Line Company
Explorer Pipeline Company
Seadock, Inc.
Texas Offshore Port, Inc.
Oil Shippers Service, Inc.
Calcasieu Chemical Corporation

GULF OIL CORPORATION

A/S Jargul
A/S Jargul & Co. K/S
Albert Rose Chemicals, Ltd.
Allied-General Nuclear Services
Asia Polymer Corp.
China Gulf Oil Company Limited
China Gulf Plastics Corporation

Colonial Pipeline Company
Compagnie D-Investissement Bustibles De Reacteurs A Haute Tp
Delaware Bay Transportation Company
Dixie Pipeline Company
Ethyleen Pijpleiding Maatschappij (Belgium) S.A.
Ethyleeo Pijpleiding Maatschappij (Nederland) B.V.
Explorer Pipeline Company
General Atomic Company
Gulf Canada Limited
Gulf Oil Zaire S.A.R.L.
Harshaw Galvanoteenia
Harshaw Quimica Ltda.
Hochtemperature Reaktorbau GMBH
Industrias Vencedor S.A.
Insco Holding & Finance Company N.V.
Interquimica S.A.
Keydril (Nigeria) Limited
Kuwait Oil Company Limited
Laurel Pipeline Company
London Oil Refining Company Limited
Mid-Valley Pipeline Company
Midwest Carbide Corporation
North River Energy Company
Oil Shippers Service, Inc.
Oklahoma Nitrogen Company
Paloma Pipe Line Company
Pembroke Capital Company
Pembroke Cracking Company
Plastigama, S.A.
Platte Pipeline Company
Pol Transport AB
Raffinerie De Cressier S.A.
Rio Blanco Oil Shale Partnership
Sarni S.P.A.—Refining
Societe de Combustible Pour Reacteurs A Haute Temperature (Corhat)
Solvent Refined Coal International, Inc.
Sunrise International Company Limited
Taita Chemical Corporation
Venezuela Gulf Refining Co.
West Texas Gulf Pipe Line Co.

MONTANA POWER COMPANY

Western Energy Company
Northwestern Resources Co. (Subsidiary of Western Energy Company)
Altana Exploration Company
Intercontinental Energy Corporation (Subsidiary of Altana Exploration Company)
Sunlight Development Company

Glacier Gas Company
North American Resources Company
Colstrip Community Services Company
Canadian-Montana Gas Company, Limited
Roan Resources, Limited (Subsidiary of Canadian-Montana Gas Company)
Canadian-Montana Pipeline Company
Montana Power International Finance, N.V.

PEABODY COAL COMPANY

The parent company of the Peabody Coal Company is Peabody Holding Company.

SHELL OIL CO.

Shell Petroleum N.V., a Netherlands corporation

Royal Dutch Petroleum Co., Hague, Netherlands

The "Shell" Transport & Trading Co., Ltd. of London, England

Butte Pipeline Company

APPENDIX C

The NORTHERN CHEYENNE TRIBE OF the NORTHERN CHEYENNE INDIAN RESERVATION, et al., Plaintiffs-Appellants,

v.

Thomas Ralph ADSIT, et al.,
Defendants-Appellees.

Nos. 79-4887, 80-3028, 80-3032, 80-3038, 80-3040 to 80-3042, 80-3044, 80-3045 and 80-3061 to 80-3063.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted July 15, 1981.

Decided Feb. 22, 1982.

Appeal from the United States District Court for the District of Montana.

Before MERRILL, CHOY and FERGUSON, Circuit Judges.

FERGUSON, Circuit Judge:

The United States government and various Montana Indian tribes appeal the dismissal of consolidated actions brought to adjudicate federal and Indian water rights in Montana. The federal court actions were dismissed in favor of state court proceedings. Dismissal was predicated on the Supreme Court's decision in *Colorado River Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976) (hereinafter "*Akin*"). Because *Akin* was erroneously applied to the facts of the Montana litigation, we reverse.

I. PROCEDURAL HISTORY.

In January, 1975, the Northern Cheyenne Tribe brought suit in United States District Court for the District of Montana to adjudicate water rights in the Tongue River and Rosebud Creek in Montana. Jurisdiction was alleged under 28 U. S. C. § 1362.[1] In March, 1975, the United States brought suit pursuant to 28 U. S. C. § 1345[2] for the same purpose, in its own right and as fiduciary on behalf of the Northern Cheyenne and other reservation tribes. In July, 1975, the Montana Department of Natural Resources and Conservation ("DNR") filed petitions in state court for a determination of all existing rights to those waters in accordance with existing state law.

In August, 1975, the United States brought suit in the district court on behalf of the Crow Tribe. Judge Battin consolidated the cases and stayed proceedings in February, 1976, pending the Supreme Court's decision in *Akin*. The State of Montana, a defendant in those cases, moved to dismiss as a result of that decision. At the same time, the Crow Tribe moved to intervene. Both motions were argued in the summer of 1976.

In February, 1979, the federal government and the tribes moved for expedited consideration. In April, 1979,

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1. 28 U. S. C. § 1362 provides:

> The district courts shall have original jurisdiction of all civil actions brought by any Indian tribe . . . wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

2. 28 U. S. C. § 1345 provides:

> [T]he district courts shall have original jurisdiction of all civil actions or proceedings commenced by the United States, or by any agency or officer thereof . . .

the United States filed more actions in the district court seeking a declaration of water rights on behalf of the United States and four additional tribes.

On May 11, 1979, an amended state water consolidation plan, Montana Senate Bill 76, took effect. The Montana Supreme Court ordered implementation and authorized the DNR to notify relevant parties in June, 1979.

In July, 1979, Judge Hatfield stayed the federal actions initiated in 1979. In November of that year, Judges Battin and Hatfield issued a joint opinion dismissing all federal actions as an exercise of "wise judicial administration" as outlined in *Akin. Northern Cheyenne Tribe v. Tongue River Water Users,* 484 F. Supp. 31 (D. C. Mont. 1979).

The United States and the Indian tribes appeal that dismissal, arguing that it is predicated on an erroneous application of *Akin.* They maintain that because the Montana constitution and enabling act contain disclaimers of jurisdiction over Indian tribes, the litigation in that state differs from the Colorado litigation which was the subject of *Akin.* Further, they argue that the specific factors underlying the *Akin* decision are not present in the Montana litigation and that the contrast requires retention of federal jurisdiction.

II. THE DISCLAIMER ISSUE.

A. *Jurisdiction over Indian Water Rights.*

Traditionally, Indian water rights have been reserved in trust to the federal government. *Winters v. United States,* 207 U. S. 564, 28 S. Ct. 207, 52 L. Ed. 340 (1908); *Arizona v. California,* 373 U. S. 546, 83 S. Ct. 1468, 10

L. Ed. 2d 542 (1963), *overruled on other grounds*, 438 U. S. 645, 98 S. Ct. 2985, 57 L. Ed. 2d 1018 (1977). Federal courts have consistently exercised jurisdiction over Indians on reservations, *Minnesota v. United States*, 305 U. S. 382, 59 S. Ct. 292, 83 L. Ed. 235 (1939), unless jurisdiction is explicitly granted to the states by congressional statute. *Fisher v. District Court of Montana*, 424 U. S. 382, 388, 96 S. Ct. 943, 947, 47 L. Ed. 2d 106 (1976). Congress has granted state courts jurisdiction over Indian rights with respect to various criminal and civil matters, but in each grant, jurisdiction over Indian water rights has been specifically excluded. 28 U. S. C. § 1360(b); 18 U. S. C. § 1162(b); 25 U. S. C. § 1322.[3]

In 1952, Congress passed the McCarran Amendment, 43 U. S. C. § 666, granting state courts jurisdiction over the United States when litigation involves comprehensive adjudication of water rights and the United States is a necessary party.

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3. Each statutory section states:

> Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, *including water rights*, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States . . .

(emphasis supplied).

Sections 25 U. S. C. 1322 (b) (alienation, encumbrance, taxation, use, and probate of property) and § 1360 (b) (state civil jurisdiction in actions to which Indians are parties) further provide that nothing in these sections

> shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. . . .

43 U.S.C. § 666(a). The Act does not mention Indians or reservations. It is limited to waiving of the sovereign immunity of the federal government with respect to water rights acquired " by . . . appropriation . . . or otherwise." In no way does the McCarran Act repeal any of the jurisdiction of the federal courts. The Act merely extends the United States' consent to suit in certain cases.

In 1976, the Supreme Court interpreted the McCarran Amendment as a grant of jurisdiction over water rights of Indian tribes when the right is asserted by the federal government as fiduciary. *Colorado River Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed. 2d 483 (1976) (*Akin*). When the United States is a party to a proceeding involving these rights, the Court held that the ability of the state to assert jurisdiction over the federal government implicitly allows jurisdiction over the rights of tribes that, without the McCarran Act, would have been immunized by federal statutes against suits in state court.

In a crucial footnote, the Court noted the restrictions on jurisdiction over Indian water rights provided in 25 U.S.C. § 1322(b) and 28 U.S.C. § 1360(b).[4] *Id.* at 812,

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4. See footnote 3, *supra*.

n. 20, 96 S. Ct. at 1244, n. 20. The Court, however, held that limiting language in those sections only qualifies the import of the general consent to state jurisdiction given by those sections; the language does not purport to limit the special consent to jurisdiction given by the McCarran Amendment. *Id.* Accordingly, the Court dismissed the federal proceeding in favor of the comprehensive ongoing state proceeding.

B. *Montana's Disclaimers and Public Law 83-280.*

The Montana litigation raises a question not at issue in *Akin*. In a state which, unlike Colorado, expressly disclaims jurisdiction over Indian lands within its constitution and enabling act, does the McCarran Act grant jurisdiction and thereby repeal the state disclaimers? We hold that it does not.

Montana was admitted to statehood in 1889 on condition that it disclaim right and title to jurisdiction over Indian lands. Montana's enabling act provides that the state "disclaim[s] all right and title to the unappropriated public lands . . . owned or held by any Indian or Indian tribes . . ." 25 Stat. 676 (1889). The disclaimer of title in the enabling act is reinforced by the disclaimer of jurisdiction in the Montana Constitution that specifically provides, "all lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the United States. . . ." Art. I, Mont. Const. 1972.

Only a year after the passage of the McCarran Act, Congress passed Public Law 83-280 establishing a procedure whereby states could repeal disclaimers in their constitutions and enabling acts. Public Law 280, "the

first jurisdictional statute of general applicability to Indian reservation lands," *Washington v. Yakima Indian Nation*, 439 U.S. 463, 471, 99 S.Ct. 740, 746, 58 L.Ed. 2d 740 (1979), dealt with "the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement." *Bryan v. Itasca County*, 426 U.S. 373, 379, 96 S.Ct. 2102, 2106, 48 L.Ed. 2d 710 (1953). Section 7 of that Act provides for automatic transfer of jurisdiction to the states by legislation. Section 6 deals with states which disclaim jurisdiction over Indians.

> Notwithstanding the provisions of any enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this subchapter. The provisions of this subchapter shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes, as the case may be.

25 U.S.C. § 1324.

The Supreme Court held that the 1953 legislation allows assumption of jurisdiction in disclaimer states by legislative action. *Yakima, supra*, 439 U.S. at 484, 99 S.Ct. at 753. Federal law does not prescribe "the manner in which the States are to modify their organic legislation." *Id.* Accordingly, in those states which so provide, legislative action alone suffices to repeal the constitutional disclaimer of jurisdiction over Indians. *Id.* Furthermore, in enacting § 6, Congress meant to remove

any federal impediments to state jurisdiction that may have been created by an enabling act. *Id.* at 488, 99 S. Ct. at 755. Hence, the determination of whether legislative action is sufficient to repeal a disclaimer depends on whether such action is sufficient under the law of the acting state to amend its constitution. *Id.* at 493, 99 S. Ct. at 757.

Public Law 280 was amended in 1968 to provide "that States that have not extended criminal or civil jurisdiction to Indian country can make future extensions only with the consent of the tribes affected." 25 U. S. C. §§ 1321(a), 1322(a). *See Yakima, supra,* at 494, n. 40, 99 S. Ct. at 758, n. 40. Hence, after 1968, a state may repeal a disclaimer of jurisdiction over reservation Indians only with the consent of the affected tribes. In addition, the scope of consent is limited to the same jurisdiction provided automatic transfer states, *i.e.*, § 7 states. 25 U. S. C. § 1322.

C. *Analytic Framework.*

The McCarran Act overrides sovereign immunity of the United States in comprehensive water rights adjudications and the immunity of an Indian tribe represented by the government in such a proceeding. It cannot be read to amend a state constitution disclaiming subject matter jurisdiction over such matters.

A valid exercise of state jurisdiction requires that the state have both personal and subject matter jurisdiction. Via the McCarran Act, the United States has waived sovereign immunity from suit in certain cases involving water rights. In *Akin*, this waiver of sovereign immunity

operated to give Colorado personal jurisdiction over the United States and implicitly allowed jurisdiction over the rights of otherwise immune Indian tribes in circumstances where the state had subject matter jurisdiction. However, when a state has chosen to disclaim subject matter jurisdiction over Indian water rights, the combination of jurisdictional prerequisites necessary for a state court to hear a challenge to Indian water rights would appear to be lacking.

The appearance that subject matter jurisdiction is lacking in a state court in a disclaimer state would only be defeated by a finding that the disclaimer had been validly repealed. In order to make such a finding, a court must first determine whether the Montana water consolidation plan acts as a legislative repeal of the constitutional disclaimer of jurisdiction. *Washington v. Yakima, supra.* Second, it must determine whether such repeal required tribal consent as provided in the 1968 amendment to Public Law 280. Only if the Montana water legislation is determined to constitute a legislative repeal within the requirements of the federal law will the McCarran Act's grant of personal jurisdiction over the United States, acting as trustee for Indian water rights, furnish the state court with the requisite personal and subject matter jurisdiction. Only if a legislative repeal is found and the state has subject matter jurisdiction, need one consult the waiver of immunity provisions of the McCarran Act and consequently the terms of *Akin.*

The district court made no such analysis. Instead, it determined that the disclaimer/non-disclaimer distinction was inconsequential to Congress in passing the McCarran Act. This conclusion cannot be accepted when

viewed in light of the specific attention paid to the disclaimer/non-disclaimer distinction in P. L. 280 by Congress only a year after it passed the McCarran Act.

The district court's decision would rub the disclaimer/non-disclaimer distinction made by Congress of all significance and meaning, and would deprive the 1968 Amendment to P. L. 280, which requires tribal consent to a repeal of the disclaimer, of any effect. Accordingly, the district court's basis for decision was erroneous.

In so holding, we decline to follow the Tenth Circuit's decision in *Jicarilla Apache Tribe v. United States*, 601 F. 2d 1116 (10th Cir.), *cert. denied*, 444 U. S. 995, 100 S. Ct. 530, 62 L. Ed. 2d 426 (1979). *Jicarilla*, in considering the precise issue raised here, refused to recognize the distinction between states with constitutional disclaimers and those without. For the reasons noted above, we believe that recognition of this distinction is crucial deciding the jurisdiction issue.

Except for *Jicarilla*, with which we expressly disagree, no case brought to our attention permits a disclaimer state to adjudicate a challenge directed against Indian water rights. Construing the Montana enabling act, *Draper v. United States*, 164 U. S. 240, 247, 17 S. Ct. 107, 109, 41 L. Ed. 419 (1896), merely held that the disclaimer in Montana's enabling act did not deprive that state of power to punish for crimes committed on a reservation or Indian lands by non-Indians.

Williams v. Lee, 358 U. S. 217, 218, 223, 79 S. Ct. 269, 269, 273, 3 L. Ed. 2d 251 (1958), held that the State of Arizona, which expressly disclaimed jurisdiction over In-

dian lands, did not have jurisdiction over an action brought by a non-Indian in state court to collect a debt against an Indian and his wife. At issue in *Williams* was whether the case should be heard in tribal or state court. In holding that the case must be heard in tribal court, *Williams* explained that state jurisdiction would interfere with essential tribal relations. In the present case, the choice is between federal court and state court, not between state and tribal court; although essential tribal relations may not be involved, essential Indian rights to water, basic to the survival of tribes, are certainly at stake. An observation in *Williams* is relevant to this case. "Through conquest and treaties [Indian tribes] were induced to give up complete independence and the right to go to war in exchange for federal protection, aid, and grants of land." *Id.* at 218, 79 S. Ct. at 269. Were the State to expressly disclaim jurisdiction and the federal courts to give up their protective jurisdiction over Indian lands, including water rights, the Indians would seem deprived of the benefit of the original bargain that they were driven to make. Of course, by general statute, Congress later expressed its willingness to have any state assume jurisdiction over reservation Indians if the state legislature or the people voted affirmatively to accept such responsibility. *Id.* at 222, 79 S. Ct. at 271. To date, Montana does not appear to have accepted such responsibility.

In passing, we note that *McClanahan v. Arizona State Tax Comm'n.*, 411 U. S. 164, 179, 180, 93 S. Ct. 1257, 1266, 36 L. Ed. 2d 129 (1972) (holding that Arizona could not impose an income tax on reservation Indians), has expressly limited the application of the *Williams* tribal self-government test to certain circumstances:

> It must be remembered that cases applying the *Williams* test have dealt principally with situations involving non-Indians. [citations omitted]. In these situations, both the tribe and the state could fairly claim an interest in asserting their respective jurisdictions. The *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.
>
> The problem posed by this case is completely different. Since appellant is an Indian and since her income is derived wholly from reservation sources, her activity is totally within the sphere which the relevant treaty and statutes leave for the Federal Government and for the Indians themselves. Appellee cites us to no cases holding that this legislation may be ignored simply because tribal self-government has not been infringed.

Similarly, in the present case, we do not believe that the enabling act, the Montana constitution, P. L. 280, and its 1968 amendment can be overlooked simply because tribal self-government has not been infringed. Unlike *Williams*, but like *McClanahan*, the present case is not one that presents as a central issue, a choice between tribal and state jurisdiction; therefore, the *Williams* test has no application whatsoever to the present situation.

Kake Village v. Egan, 369 U. S. 60, 75, 82 S. Ct. 562, 570, 7 L. Ed. 2d 573 (1962), held that a disclaimer state could regulate the fishing of off-reservation Indians by enforcing against non-reservation Indians a state statute forbidding the use of salmon traps. Referring to *Kake*, *White Mountain Apache Tribe v. Arizona*, 649 F. 2d 1274, 1280 (9th Cir. 1981), which held that a disclaimer state is not precluded from imposing fishing and hunting license fees on non-Indians on a reservation, noted that the en-

abling acts do not force states to disclaim governmental or regulatory authority over Indian lands. We believe that *Jicarilla*, supra, went too far by relying on the distinction between proprietary and governmental functions drawn in *Kake* and *White Mountain Apache Tribe*. All that the latter two cases recognize is that a state may have a strong governmental interest that empowers it to regulate certain limited conduct concerning non-reservation Indians or non-Indians on reservations. Neither *Kake* nor *White Mountain Apache Tribe* permits a state court to decide how much water reservation Indians may take for use on their reservations.

The present case is not about fishing traps or licenses. More is at stake here than the mere power of a state legislature to regulate the use of fishing traps, where the power to regulate may have a secondary effect on Indian fishing rights; instead, the rights of Indians to the water itself is at issue. The power of a court in a disclaimer state to enforce a regulatory statute that may adversely affect Indians falls far short of the power to adjudicate a direct challenge to Indian water rights in and to the waters of streams. A disclaimer state cannot assert jurisdiction over such matters until Indian sovereign immunity has been waived and the state has repealed its disclaimer. Unless the state effectively repeals its disclaimer, it cannot hear this matter.

III. THE *AKIN* FACTORS.

Even if we were to find that Montana had validly repealed the disclaimer language in its constitution, we would nonetheless be compelled to reverse the decision below. The limited factual circumstances of *Akin* prevent

its application to the Montana litigation. Noting the virtually unflagging obligation of the federal courts to retain jurisdiction, the *Akin* Court held that principles of "wise judicial administration," *Akin, supra,* at 817, 96 S. Ct. at 1246, required dismissal given the "exceptional circumstances" of that case. *Id.* at 818, 96 S. Ct. at 1246. In the instant case, no exceptional circumstances mandate dismissal in the exercise of wise judicial administration.

The "exceptional circumstances" requiring dismissal in *Akin* included the following: Colorado had an extensive ongoing water plan in which the United States had participated. Colorado is not a disclaimer state. The federal government sued in federal court on behalf of several Indian tribes under 28 U. S. C. § 1345. During the pleading stage the federal court dismissed in favor of the ongoing state proceeding. The suit by the United States in federal court involved one small division of the state plan while the state proceeding was comprehensive. The Indians involved did not receive water rights by treaty. Nor did the Court find that the United States faced a conflict of interest in representing its various interests.

The Court noted in its decision (a) the apparent absence of any proceedings in the district court other than the filing of the complaint, (b) the extensive involvement of the state and state water rights, (c) the inconvenience of the federal forum's 300-mile distance from the location of the dispute and (d) the existing participation by the Government in the state proceeding. *Id.* at 820, 96 S. Ct. at 1247. Further, it noted that the federal forum must defer to the state where both have concurrent jurisdiction and the state action preceded the federal.

In limiting its holding, the Court stated: "[W]e do not overlook the heavy obligation to exercise jurisdiction. We need not decide . . . whether, despite the McCarran Amendment, dismissal would be warranted if more extensive proceedings had occurred, . . . if the involvement of state water rights were less extensive . . ., or if the state proceedings were in some respect inadequate to resolve the federal claims . . .," *id.* at 820, 96 S. Ct. at 1247, or if the suit were "brought by a private party," *id.* at n. 26. The Montana litigation is sufficiently different from that in *Akin* to require the district court to accept its "virtually unflagging obligation" to entertain jurisdiction.

Before considering the factors discussed in *Akin*, we note that under the heading "wise judicial administration," the district court included limited federal resources as a reason for leaving adjudication to the state courts. *Northern Cheyenne Tribe, supra*, at 36. It is a well established point, however, that conservation of federal judicial resources is not a proper reason for dismissing a case from the federal courts. An action properly filed in district court is not to be dismissed or referred to state court simply because the district court considers itself too busy to try the action. *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 344, 96 S. Ct. 584, 589, 46 L. Ed. 2d 542 (1975). Shortages of judicial manpower are indeed unfortunate where they occur; however, it is not wise judicial administration for a federal court to shirk its responsibility to hear federal questions just because the court may not be able to dispatch the case as quickly as it may want to.

A. *Stage of the Proceedings.*

Akin involved a completed proceeding which had been in the adjudication process for years. Furthermore, the federal action in *Akin* involved only one section of the state; the United States was already a party in state proceedings in other water divisions. Finally, Akin did not involve allegations that the United States would be subject to conflicts of interests in representing its varied interests along with tribal interests.

In contrast, the Montana state court litigation has not passed the notice stage. The comprehensive plan envisioned by Montana was not enacted, until four years after the first federal suit was filed. Claims to all water rights under the plan will not be complete until 1982. In addition, though the federal litigation is no further along than the state litigation, the district courts stayed proceedings, apparently awaiting the state legislation.

B. *Comprehensiveness.*

Akin involved a truly comprehensive proceeding in state court with a concurrent piecemeal proceeding in federal court. Montana claims that a federal proceeding in the Montana case will be piecemeal because the federal courts have been unable to obtain jurisdiction over all defendants due to the in personam nature of the case. Further, Montana points out that the federal proceeding excludes the Missouri River and other important water bodies within the state. The federal action is limited to claims in which the United States owns a reserved water right. As to the actions that took place, the state claims that federal notice to affected parties was inadequate.

The Tribes counter that the state proceeding will be piecemeal because Indian allottees may not be joined. They also claim that the state proceeding is inadequate as it adjudicates only claims accruing after 1973 and excludes claims for livestock purposes. The state asserts that the exempted water rights involve a minimal amount of water. The district court does not explain the basis for its conclusion on the issue of comprehensiveness; nor did it make findings regarding the Tribe's claims.

The Tribes argue that even if all parties could be joined in the state proceeding, the federal court could adopt state joinder procedures and appoint special masters to implement the federal proceeding. They correctly stress that *Akin* only required dismissal where the federal proceeding would be piecemeal and the state proceeding is comprehensive. Where that is not the case and jurisdiction is concurrent, the federal court may not abdicate its judicial obligations.

C. *The Race to the Court.*

In *Akin*, state proceedings were ongoing when the federal action was filed. In Montana, the federal proceeding was the predecessor. This factor is not determinative, however, as both proceedings are in their infancy.

D. *Forum Non Conveniens.*

Akin relied on factors suggestive of a forum non conveniens analysis. Distance was a major consideration as the federal proceeding was 300 miles from the water district in question. The court relied on difficulty to the

parties in travelling to the location. That factor is not present in this case to encourage dismissal.

E. *Conflicts of Interest.*

In any state litigation, the United States must represent the water rights of all tribes as well as those of the Bureau of Land Management, the U. S. Forest Service, and other federal entities. The United States and the Tribes argue that conflicts among these interests would prevent the United States from representing them adequately. When the United States is faced with such a conflict, its representation of Indians is inadequate. *Manygoats v. Kleppe*, 558 F. 2d 556, 558 (9th Cir. 1972). Hence, the United States and the Tribes claim the Indians would be necessary parties over whom the state court has no jurisdiction.

The Tribes further argue that the result in *Akin* was limited to a situation in which the United States could effectively represent all of its diverse rights because of the limited scope of the proceeding. In contrast, the Montana litigation involves all water rights in the state. The McCarran Act is complied with only when the inclusion of the United States as a necessary party will provide complete adjudication of all issues. *Akin, supra*, at 819, 96 S. Ct. at 1247.

The state, relying on *Jicarilla*, argues that the Indians' right to intervene in court proceedings sufficiently protects their interests. However, we are reluctant to follow *Jicarilla* on this point for two reasons. First, it is unclear that the tribes have a right to intervene; if the state has disclaimed personal jurisdiction over the In-

dians, then they may not have that right. Whether the state disclaimer provisions reach so far is a question of state law that we need not and do not reach. Second, apart from any possible state disclaimer of personal jurisdiction, Indian tribes have long been recognized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers; without express waived of sovereign immunity, an Indian tribe cannot be sued. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59, 98 S.Ct. 1670, 1676-1677, 56 L. Ed. 2d 106 (1979). In the present case, the Indian tribe appears to be a necessary party to the state court proceeding, yet neither Congress nor the Tribe has consented to such a suit in state court. Under these circumstances, where the sovereign immunity of the Tribe has not been waived, and there is a conflict of interest between the Tribe and the United States, the Tribe could only protect its rights by intervening, at the expense of its basic right to sovereign immunity. We will not put the Tribe to this Hobson's choice.

Thus, the instant case is unlike the *Akin* case, in which the Tribe was not a necessary party and the United States, as trustee to the Indians' water rights, could apparently act as trustee without conflict of interest. Our examination of this conflicts factor leads us to conclude that it would not be wise or appropriate for the federal court to give up its traditional jurisdiction and defer to the state court in this case.

F. Jurisdiction under 28 U.S.C. § 1362.

The Montana litigation involves petitions by Indian tribes pursuant to 28 U.S.C. § 1362. That section, enacted

in 1966, authorizes suits by tribes in federal courts without the $10,000 amount in controversy requirement.

In *Akin*, the Supreme Court dismissed a suit brought by the federal government pursuant to 28 U. S. C. § 1345, authorizing the United States to sue in federal court. The Court declined to decide whether dismissal would have been appropriate had suit been brought by a private party. 424 U. S. at 820, n. 26, 96 S. Ct. at 1247, n. 26.

If this court were to further extend *Akin* in the Montana case to a suit brought by an Indian tribe, the result could prevent Indians from fully litigating their rights to water in federal court. Each time a tribe sued in federal court, the state need only join the United States as a party to obtain dismissal of the federal action. It is contrary to all reason to permit the states to frustrate federal jurisdiction merely by joining the United States as a party.

IV. CONCLUSION.

The Supreme Court has expressly and repeatedly noted the obligation of federal courts to retain jurisdiction in all but the most exceptional of circumstances.

The circumstances of the Montana litigation are sufficiently distinct f om the factors warranting exceptional treatment in *Akin*. The conflicts of interest present, the embryonic stage of state and federal proceedings, and the procedural status of the Montana case favor retention of federal jurisdiction. Accordingly, we reverse.

V. THE CROW TRIBE APPEAL.

The Crow Tribe moved to intervene in the district court. The district court refused to rule on the motion,

instead dismissing the action with the rest. To the extent that the court's action was a de facto denial of the motion, the tribe should be permitted to intervene in the interest of avoiding piecemeal litigation.

The judgment of the district court is REVERSED.

MERRILL, Circuit Judge, dissenting:

I dissent from the Court's holding that the disclaimer clauses in the Montana Statehood Act and in the State Constitution deprive the state courts of jurisdiction to establish and adjudicate reserved water rights of the United States held by it in trust for the Indians. On this issue I agree with *Jicarilla Apache Tribe v. United States*, 601 F. 2d 1116 (10th Cir.), *cert. denied*, 444 U. S. 995, 100 S. Ct. 530, 62 L. Ed. 2d 426 (1979).

The disclaimer clauses disclaim all right and title to Indian lands. But no one here lays any claim to Indian lands or water rights. The Statehood Act disclaimer provides that Indian lands "shall be and remain subject to the disposition of the United States, and * * * shall remain under the absolute jurisdiction and control of the Congress of the United States." 25 Stat. 676 (1889). But no one here disputes that Congress has always had jurisdiction and control over land owned by the United States and held by it in trust for Indians and that such lands always remained subject to disposition by Congress. Indeed, in enacting the McCarran Amendment, 43 U. S. C. § 666, Congress exercised its plenary control over Indian lands to authorize the states to adjudicate, as part of general stream adjudications, the federal reserved water rights of Indians. *See Colorado River Water Conservation District v. United States*, 424 U. S. 800, 96 S. Ct. 1236,

47 L. Ed. 2d 483 (1976) (*"Akin"*). The sole question then, as I see it, is whether the language "absolute jurisdiction and control of the Congress" is to be construed to mean exclusive jurisdiction of the federal courts in all suits involving Indian lands or property rights. In holding that that is not the meaning to be attributed to the language, *Jicarilla* followed *Organized Village of Kake v. Egan*, 369 U. S. 60, 82 S. Ct. 562, 7 L. Ed. 2d 573 (1962), where the Supreme Court held to that effect.

In that case, under the Alaska Statehood Act, the United States retained "absolute jurisdiction and control" over Indian property. The property in question was Indian fishing rights and the issue was the right of Alaska to regulate the Indian use of salmon traps. Speaking for the Court, Justice Frankfurter concluded from the Court's decisions in *Williams v. Lee*, 358 U. S. 217, 220, 79 S. Ct. 269, 270, 3 L. Ed. 2d 251 (1946), and *Draper v. United States*, 164 U. S. 240, 17 S. Ct. 107, 41 L. Ed. 419 (1896), that "'absolute' federal jurisdiction is not invariably exclusive jurisdiction." 369 U. S. at 68, 82 S. Ct. at 567. "[A]n examination of past . . . decisions makes clear," he wrote, "that the words 'absolute jurisdiction and control' are not intended to oust the State completely from regulation of Indian 'property (including fishing rights).'" *Id.* at 71, 82 S. Ct. at 568. He concluded, "These decisions indicate that even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law." *Id.* at 75, 82 S. Ct. at 570.

To the same effect is this Court's recent decision in *White Mountain Apache Tribe v. Arizona*, 649 F. 2d 1274 (9th Cir. 1981). We there cited the *Organized Village of*

Kake and *Jicarilla* decisions for the proposition that the "Enabling Acts themselves forced states to disclaim only their proprietary interest in Indian land, not the states' governmental or regulatory authority over that land." 649 F. 2d at 1280.

If the disclaimers are no bar to state regulation of Indian property rights where those rights confront legitimate state interests, the McCarran Amendment, as discussed in *Akin*, makes it clear that state courts are vested with jurisdiction in the adjudication of Indian water rights.

McClanahan v. Arizona State Tax Commission, 411 U. S. 164, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973), is not to the contrary. There, in holding that Arizona was without jurisdiction to impose on reservation Indians a tax on income derived from reservation sources, the Supreme Court described the tribal interest at issue as "totally within the sphere which the relevant treaty and statute leave for the Federal Government and for the Indians themselves." *Id.* at 179-180, 93 S. Ct. at 1266. Here, in stark contrast, the McCarran Amendment actually authorizes the states to adjudicate as part of comprehensive stream adjudications the federal reserved water rights of Indians. "The consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights. . . ." *Akin, supra*, 424 U. S. at 819, 96 S. Ct. at 1247.

Further I dissent from the Court's holding that wise judicial administration, as that term is used in *Akin*, does not call for dismissal of the federal suits. The district court dealt at length with the special circumstances presented by this case, taking note of Montana's detailed

water use legislation. *See* 484 F. Supp. at 35-36. Pursuant to that legislation, the Montana Supreme Court has filed an order requiring all persons claiming a water right within the state to file a statement of that claim with the State Department of Natural Resources and Conservation. These claims will be referred to water judges appointed in each of the state's four water divisions who shall enter a preliminary, and after an opportunity for hearing, a final comprehensive water decree.

The district court concluded:

> It is clear that the adjudication contemplated by the Bill is both comprehensive and efficient. As the general adjudication has been initiated by recent order of the Montana Supreme Court, it would seem that the greater wisdom lies in following *Colorado River*, and, on the basis of wise judicial administration, deferring to the comprehensive state proceedings. The federal proceedings are all in their infancy; service of process has been but recently completed. The state adjudication is thorough, as opposed to the piecemeal proceedings initiated by the Government. There is no jurisdictional question preliminarily attending the state adjudication; all such questions have been eliminated by the McCarran Amendment. The state forum will likely be more convenient, geographically, than the federal forum. The amount of time contemplated for completion of the state adjudication is significantly less than would be necessary for federal adjudication, insofar as the state has provided a special court system solely devoted to water rights adjudication. The federal judicial resources in Montana are limited; continued exercise of federal jurisdiction over the pending adjudications would either exhaust or severely deplete those resources for a substantial number of years, just by virtue of the number of parties involved. (In these cases, there are approximately 9,000 defendants.) The possibility of conflicting ad-

> judications by the concurrent forums also looms large and could be partially avoided only by staying the pending state adjudication, an action *Colorado River* has intimated is distinctly repugnant to a clear state policy and purpose.

484 F. Supp. at 36. Accordingly, "on the basis of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation," the court ordered the cases dismissed. *Id.*

I agree with the district court. Water adjudication is essentially a local concern, and in every western state water scarcity poses a problem not just to Indians but to everyone. In my view, it is highly important that each state be accorded room for an effort to solve its water scarcity problem in the manner it regards as most appropriate. Here so long as Montana gives recognition to Indian water rights and their establishment pursuant to federal law, I see no good reason why Indians should not be joined with all other water users in the state in order to achieve a comprehensive state adjudication.

I would affirm.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos.	79-4887	80-3042
	80-3028	80-3044
	80-3032	80-3045
	80-3038	80-3061
	80-3040	80-3062
	80-3041	80-3063
DC#	75-6	79-33
	75-20	79-34
	79-21	79-40
	79-22	

THE NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION,

Plaintiff-Appellant,

v.

THOMAS RALPH ADSIT, et al.,

Defendants-Appellees.

(Filed April 5, 1982)

ORDER CLARIFYING OPINION

Before:

MERRILL, CHOY and FERGUSON, Circuit Judges.

The motion of plaintiff United States for clarification of the opinion issued herein is granted. The opinion is ordered amended as follows:

a. In the following passage on page — of — F. 2d — (slip op. at 726), "They" is ordered deleted. "The Indian tribes" shall be substituted for "They":

> The United States and the Indian tribes appeal that dismissal, arguing that it is predicated on an erroneous application of *Akin*. They maintain that because the Montana constitution and enabling act contain disclaimers of jurisdiction over Indian tribes, the litigation in that state differs from the Colorado litigation which was the subject of *Akin*.

b. In the following passage on page — of — F. 2d — (slip op. at 733), the italicized language is ordered deleted:

> The *United States and the* Tribes argue that conflicts among these interests would prevent the United States from representing them adequately. . . . Hence, *the United States and* the Tribes claim the Indians would be necessary parties over whom the state court has no jurisdiction.

(emphasis and ellipsis added.)

APPENDIX E

The NORTHERN CHEYENNE TRIBE OF the NORTHERN CHEYENNE INDIAN RESERVATION, Plaintiff,

v.

TONGUE RIVER WATER USERS ASSOCIATION, a corporation, et al., Defendants.

UNITED STATES of America, Plantiff,

v.

TONGUE RIVER WATER USERS ASSOCIATION et al., Defendants.

UNITED STATES of America, Plaintiff,

v.

BIG HORN LOW LINE CANAL et al., Defendants.

UNITED STATES of America, Plaintiff,

v.

Velva AASHEIM et al., Defendants.

UNITED STATES of America, Plaintiff,

v.

Arvin S. AAGESON et al., Defendants.

UNITED STATES of America, Plaintiff,

v.

AMS RANCH, INC. et al., Defendants.

UNITED STATES of America, Plaintiff,

v.

Annette A. ABELL et al., Defendants.

Nos. CV-75-6-BLG, CV-75-20-BLG, CV-75-34-BLG, CV-79-40-BLG, CV-79-21-GF, CV-79-22-GF and CV-79-33-M.

United States District Court, D. Montana, Billings Division, Great Falls Division, Missoula Division.

Nov. 29, 1979.

MEMORANDUM AND ORDER

BATTIN, Chief District Judge and HATFIELD, District Judge.

Pending before the various divisions of this Court are several actions brought by the United States for the purpose of adjudicating the water rights of certain Indian tribes as well as Indian and non-Indian individuals in and to the waters of certain streams. This general stream adjudication is before this Court upon the plaintiffs' invocation of 28 U. S. C. § 1345. The State of Montana has moved to dismiss in certain of these cases, on the grounds that the courts of the State of Montana, rather than the federal courts, are the proper forum for adjudicating water rights. As the Court is faced with a question common to each of the captioned cases in addressing the State of Montana's motion, the cases have been jointly considered by the Judges of this Court before whom they are pending, and the State's motion jointly addressed. Upon consideration of each of the cases presently before the Court, we find that, based upon the decision of the Supreme Court in *Colorado River Conservation District v. United States*, 424 U. S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976), and the policy of wise judicial administration affirmed therein, the State of Montana's motion to dismiss is well taken, and each of the captioned cases must be dismissed.

A. Jurisdiction

The water rights adjudications in issue have each been brought pursuant to 28 U. S. C. § 1345. That section provides that the district courts shall have jurisdiction over all civil actions brought by the Federal Government

"[e]xcept as otherwise provided by Act of Congress". In *Colorado River Conservation District v. United States*, the Supreme Court considered whether the McCarran Amendment is such an Act of Congress excepting federal jurisdiction under § 1345.

The Court found that the Amendment (which is uncodified) does not, by its terms, indicate any repeal of federal jurisdiction under § 1345 to entertain federal water suits. The Court further found that the immediate effect of the Amendment is to give consent to jurisdiction in the state courts concurrent with jurisdiction in the federal courts over controversies involving federal rights to the use of water. The Court's holding that the McCarran Amendment constituted consent to concurrent state jurisdiction also embraced consent to adjudication of Indian water rights.

> Not only the Amendment's language, but also its underlying policy, dictates a construction including Indian rights in its provisions. *United States v. District Court for Eagle Country* [sic], 401 U. S. 520, 91 S. Ct. 998, 28 L. Ed. 2d 278 rejected the conclusion that federal reserved rights in general were not reached by the Amendment for the reason that the Amendment "[deals] with an all-inclusive statute concerning 'the adjudication rights to the use of water of a river system.'" [Citations omitted.] This consideration applies as well to federal water rights reserved for Indian reservations.
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> 424 U. S. at 810, 96 S. Ct. at 1243.

It is perfectly evident from the Court's holding in the *Colorado* case that not only does the McCarran Amendment permit concurrent state and federal jurisdiction over adjudication of federal water rights, but also is to be construed as reaching federal water rights reserved on be-

half of the Indians. By enacting the McCarran Amendment, the Government has in no way breached its special obligation to the tribes.

> Mere subjection of Indian rights to legal challenge in state court, however, would no more imperil those rights than would a suit brought by the Government in district court for their declaration, a suit which, absent the consent of the Amendment, would eventually be necessitated to resolve conflicting claims to a scarce resource. The Government has not abdicated any responsibility fully to defend Indian rights in state court, and Indian interests may be satisfactorily protected under regimes of state law.
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> 424 U.S. at 812, 96 S.Ct. at 1243.

B. Abstention

Although this Court recognizes that it has jurisdiction over the subject matter of the instant actions under § 1345, it nonetheless finds merit in the State's motion to dismiss. Abstention, however, is not the judicial vehicle by which that end is properly attained. The *Colorado* case has carefully instructed us that the doctrine of abstention is narrow, and can only be invoked in certain limited instances. In determining that the district court erred in abstaining, the Supreme Court defined with some precision the instances in which abstention is proper. The Court found that the *Colorado* case fell without the grounds for abstention for the reason that, although

> state claims are involved in the case, the state law to be applied appears to be settled. No questions bearing on state policy are presented for decision. Nor will decision of the state claims impair efforts to implement state policy as in *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424. To be sure, the federal claims that are involved in the

> case go to the establishment of water rights which may conflict with similar rights based on state law. But the mere potential for conflict in the results of adjudications does not, without more, warrant staying exercise of federal jurisdiction. [Citations omitted.] The potential conflict here, involving state claims and federal claims, would not be such as to impair impermissibly the State's effort to effect its policy respecting the allocation of state waters. Nor would exercise of federal jurisdiction here interrupt any such efforts by restraining the authority vested in state officers.
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> 424 U. S. at 815, 816, 96 S. Ct. at 1245.

C. Policy of Wise Judicial Administration

Although the Court found that the *Colorado* case fell within none of the categories permitting abstention, the Court nonetheless upheld the district court's dismissal of the federal water adjudication. In examining the record, the Court found that principles bottomed on "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation", 424 U. S. at 817, 96 S. Ct. at 1246, made deference to the state courts by dismissal of the federal action proper. In so determining, the Court stated that the grounds for such dismissal are even more narrow than those for abstention, in view of the federal court's obligation to exercise its jurisdiction.

> Given this obligation, and the absence of weightier considerations of constitutional adjudication and state-federal relations, the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited that the circumstances appropriate for abstention
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> 424 U. S. at 818, 96 S. Ct. at 1246.

The Court illuminated those factors making dismissal proper. It determined that such factors as the inconvenience of the federal forum (in terms of distance from the situs of the action), the desirability of avoiding piecemeal litigation, and the order in which jurisdiction was obtained by the concurrent forums are proper for consideration.

> No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counseling against exercise is required.
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> 424 U.S. at 818, 819, 96 S.Ct. at 1247.

Further factors highlighted by the Court as meriting consideration include: in water rights litigation, the interdependency of the various rights; the availability of comprehensive state systems for adjudication of water rights; the stage of the proceedings in the federal court, beyond the filing of the complaint and the motion to dismiss; the extensive involvement of state water rights (in *Colorado*, 1,000 defendants were named); and the apparent design of the McCarran Amendment to avoid piecemeal or burdensome litigation.

By enactment of the last legislature of the State of Montana, Senate Bill 76, as yet uncodified has provided the vehicle for adjudicating claims of existing water rights in Montana. The provisions of that bill bear heavily upon this Court's decision to dismiss these cases on the basis of wise judicial administration.

In essence the Bill provides for adjudication of all existing water rights in the State of Montana. Section 6 of the Bill provides that:

(1) The action for the adjudication of all existing water rights under [this act] is commenced with the issuing of the order by the Montana supreme court to file a statement of a claim of an existing water right as provided in [section 16].

(2) The water judge for each division shall exercise jurisdiction over all matters concerning the determination and interpretation of existing water rights within his division. . . .

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(4) All matters concerning the determination and interpretation of existing water rights shall be brought before or immediately transferred to the water judge in the proper water division unless witnesses have been sworn and testimony has been taken by a district court prior to the date of the Montana supreme court order as provided in [section 16].

Section 16 of the Bill provides that:

(1) The Montana supreme court shall within 10 days of the filing of the petition by the attorney general issue an order to file a statement of a claim of an existing water right in substantially the following form:

"WATER RIGHTS ORDER

FAILURE TO FILE A CLAIM AS REQUIRED BY LAW WILL RESULT IN A CONCLUSIVE PRESUMPTION THAT THE WATER RIGHT OR CLAIMED WATER RIGHT HAS BEEN ABANDONED. . . . This order is notice of commencement of procedures for the general adjudication of existing rights to the use of water and of the requirement to file a claim for certain existing rights to the use of water. Every person, including but not limited to an individual, partnership, association, public or private corporation, city or other municipality, county, state agency of the state of Montana, and federal agency of the United States of America on its own

> behalf or as trustee for any Indian or Indian tribe, asserting a claim to an existing right to the use of water arising prior to July 1, 1973, is ordered to file a statement of claim to that right with the department no later than June 30, 1983. . . ."

The above-cited sections reflect both the policy and the essential mechanism for adjudication of state water rights. Adjudication by adversary proceeding initiated by one claimant against all others in his drainage has been forsaken in favor of blanket adjudication of *all* claims, including federal and federal trust claims, in a systematic manner. The procedure outlined in the Bill is that of: (1) filing of an order by the Supreme Court requiring the filing by all claimants of statements of each claim; (2) upon filing of all claims, submission of the claims to the water judge in the division or district in which the claimed water is diverted; (3) through utilization of special masters, the rendering, by the water judge, on the basis of the filed claims, of a preliminary decree of water right; (4) after passage of time without objection to the preliminary decree, entry of a final decree of water right which is binding upon all parties; (5) if objection is timely taken by the claimant to the preliminary decree, judicial determination of the right, but without the necessity of joining all users in the claimant's drainage. It is clear that the adjudication contemplated by the Bill is both comprehensive and efficient. As the general adjudication has been initiated by recent order of the Montana Supreme Court, it would seem that the greater wisdom lies in following *Colorado River*, and, on the basis of wise judicial administration, deferring to the comprehensive state proceedings. The federal proceedings are all in their infancy; service of process has

been but recently completed. The state adjudication is thorough, as opposed to the piecemeal proceedings initiated by the Government. There is no jurisdictional question preliminarily attending the state adjudication; all such questions have been eleminated by the McCarran Amendment. The state forum will likely be more convenient, geographically, than the federal forum. The amount of time contemplated for completion of the state adjudication is significantly less than would be necessary for federal adjudication, insofar as the state has provided a special court system solely devoted to water rights adjudication. The federal judicial resources in Montana are limited; continued exercise of federal jurisdiction over the pending adjudications would either exhaust or severely deplete those resources for a substantial number of years, just by virtue of the number of parties involved. (In these cases, there are approximately 9,000 defendants.) The possibility of conflicting adjudications by the concurrent forums also looms large and could be partially avoided only by staying the pending state adjudication, an action *Colorado River* has intimated is distinctly repugnant to a clear state policy and purpose.

Therefore, on the basis of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.

IT IS ORDERED that the above-captioned cases be, and the same hereby are, dismissed.

APPENDIX F

THE MONTANA WATER USE ACT
§§ 89-865 - 89-8-111, R. C. M. 1947:

89-865. Short title. This act shall be known and may be cited as the "Montana Water Use Act."

History: En. Sec. 1, Ch. 452, L. 1973.

89-866. Declaration of policy and purpose. (1) Pursuant to article IX of the Montana constitution, the legislature declares that any use of water is a public use, and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this act.

(2) A purpose of this act is to implement article IX, section 3(4) of the Montana constitution, which requires that the legislature provide for the administration, control, and regulation of water rights and establish a system of centralized records of all water rights. The legislature declares that this system of centralized records recognizing and establishing all water rights is essential for the documentation, protection, preservation and future beneficial use and development of Montana's water for the state and its citizens, and for the continued development and completion of the comprehensive state water plan.

(3) It is the policy of this state and a purpose of this act to encourage the wise use of the state's water resources by making them available for appropriation consistent with this act, and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the

least possible degradation of the natural aquatic ecosystems. In pursuit of this policy, the state encourages the development of facilities which store and conserve waters for beneficial use, for the maximization of the use of those waters in Montana, for the stabilization of stream flows, and for groundwater recharge.

(4) Pursuant to article IX, section 3(4) of the Montana constitution, it is further the policy of this state and a purpose of this act to recognize and confirm all existing rights to the use of any waters for any useful or beneficial purpose.

History: En. Sec. 2, Ch. 452, L. 1973.

89-867. Definitions. Unless the context requires otherwise, in this chapter the following definitions apply:

(1) "Water" means all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including geothermal water and diffuse surface water.

(2) "Beneficial use" means a use of water for the benefit of the appropriator, other persons, or the public, including, but not limited to, agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses. A use of water for slurry to export coal from Montana is not a beneficial use. Slurry is a mixture of water and insoluble matter.

(3) "Appropriate" means to divert, impound, or withdraw (including by stock for stock water) a quantity of water or, in the case of a public agency, to reserve water in accordance with 89-890.

(4) "Existing right" means a right to the use of water which would be protected under the law as it existed prior to July 1, 1973.

(5) "Groundwater" means any water beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water, and which is not a part of that surface water.

(6) "Well" means any artificial opening or excavation in the ground, however made, by which groundwater is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn.

(7) "Permit" means the permit to appropriate issued by the department under 89-880 through 89-887.

(8) "Certificate" means the certificate of water right issued by the department under 89-879, 89-880(5), and 89-888.

(9) "Declaration" means the declaration of an existing right filed with the department under 89-872.

(10) "Waste" means the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

(11) "Political subdivision" means any county, incorporated city or town, public corporation, or district created pursuant to state law or other public body of the state empowered to appropriate water, but not a private corporation, association, or group.

(12) "Person" means an individual, association, partnership, corporation, state agency, political subdivision, the United States or any agency thereof, or any other entity.

(13) "Department" means the department of natural resources and conservation provided for in Title 82A, chapter 15.

(14) "Board" means the board of natural resources and conservation provided for in 82A-1509.

History: En. Sec. 3, Ch. 452, L. 1973; amd. Sec. 1, Ch. 192, L. 1974; amd. Sec. 1, Ch. 485, L. 1975; amd. Sec. 1, Ch. 416, L. 1977; amd. Sec. 7, Ch. 460, L. 1977.

89-868. Powers and duties of department. (1) The department shall:

(a) enforce and administer this act and rules adopted by the board under section 5 [89-869];

(b) prescribe procedures, forms, and requirements for applications, permits, certificates, declarations, and proceedings under this act, and prescribe the information to be contained in any application, declaration or other document to be filed with the department under this act;

(c) keep in its Helena office a centralized public record of permits, certificates, declarations, applications, and other documents filed in its office under this act;

(d) co-operate with, assist, advise, and co-ordinate plans and activities with the federal, state, and local agencies in matters relating to this act;

(e) upon request by any person, co-operate with, assist, and advise that person in matters pertaining to measuring water or filing declarations with the department under this act.

(2) The department may:

(a) enter into agreements with federal, state, or local agencies necessary to carry out this act;

(b) apply for, accept, administer, and expend funds, grants, gifts, and loans from the federal government or any other public or private source for the purposes of this act.

History: En. Sec. 4, Ch. 452, L. 1973.

89-869. Powers and duties of board. (1) The board may prescribe fees or service charges for any public service rendered by the department under this act or under Title 89, chapter 29, including fees for the filing of applications or for the issuance of permits and certificates. There shall be no fees for the filing of declarations or for the issuance of certificates of existing rights.

(2) The board may adopt rules necessary to implement and carry out the purposes and provisions of this act. These rules may include, but are not limited to, rules to:

(a) govern the issuance and terms of interim permits authorizing an applicant for a regular permit under this act to begin appropriating water immediately, pending final approval or denial by the department of the application for a regular permit;

(b) require the owner or operator of appropriation facilities to install and maintain suitable controlling and measuring devices;

(c) require the owner or operator of appropriation facilities to report to the department the readings of measuring devices at reasonable intervals, and to file reports on appropriations; and

(d) regulate the construction, use and sealing of wells to prevent the waste, contamination or pollution of groundwater.

(3) The board shall adopt rules providing for and governing temporary emergency appropriations, without prior application for a permit, necessary to protect lives or property.

History: En. Sec. 5, Ch. 452, L. 1973; amd. Sec. 1, Ch. 238, L. 1974; amd. Sec. 2, Ch. 485, L. 1975.

89-870. Determination of existing rights. (1) The department shall establish a centralized record system of all existing rights, and the department shall, as soon as practicable, begin proceedings under this act to determine existing rights. To accomplish this, the department shall gather data essential to the proper understanding and determination of those existing rights.

(2) The department may select and specify areas or sources where the need for a determination of existing rights is most urgent, and first begin proceedings under this act to determine the existing rights in those areas or sources.

History: En. Sec. 6, Ch. 452, L. 1973.

89-871. Data for determination of existing rights. The data gathered by the department for the determination of existing rights shall include, but are not limited to:

(1) court decrees adjudicating water rights in a proceeding commenced prior to the effective date of this act. Upon request of the department, the clerks of the district courts shall furnish the department copies of all decrees affecting water rights;

(2) declarations of existing rights filed under section 8 [89-872];

(3) records of rights acquired under the groundwater code (sections 89-2911 through 89-2936);

(4) notices of appropriation filed under sections 89-801.2 and 89-810;

(5) records of declarations filed under sections 89-121 and 89-813;

(6) records of statements filed under section 89-907;

(7) the findings of water resource surveys conducted by the department and its predecessor agencies;

(8) the findings of inspections, surveys, reconnaissance, and investigations of the area or source involved as the department makes.

History: En. Sec. 7, Ch. 452, L. 1973.

89-872. Declarations of existing rights. (1) The department shall obtain from the district court an order pursuant to section 89-873 requiring each person claiming an existing right within a specified area or from a specified source to file a declaration of existing right within one (1) year after the effective date of the order. The department shall publish notice of the order once a week for four (4) consecutive weeks prior to its effective date in a newspaper of general circulation in the affected area. Before the last date of publication, the department shall also serve a copy of the order by certified mail upon each appropriator or his successor in interest within the specified area or from the specified source who has requested mailed notice of the order or of whom the de-

partment can readily obtain knowledge, and to each person owning or being possessed of lands bordering on the stream or source as ascertained from the land ownership records of the appropriate county. The department shall file in its records proof of service of the notice by affidavit of the publisher in the case of notice by publication, and by its own affidavit in the case of service by mail.

(a) The department of fish and game may represent the public for purposes of establishing any prior and existing public recreational use in existing right determinations under this act, provided that the foregoing shall not be construed in any manner as a legislative determination of whether or not a recreational use sought to be established prior to July 1, 1973, is or was a beneficial use.

(2) A declaration shall be made under oath by each person claiming an existing right to use water within the specified area or from the specified source on a form provided by the department. The department shall make the forms available through its offices and the offices of the county clerks and recorders. The information required by the department may include, but is not limited to, the date of appropriation, the date the water was first applied to a beneficial use, the amount of water appropriated, the purpose of the appropriation, the place and means of diversion, the place of use, the time during which the water is diverted and used each year, and a true copy or the docket number of any judicial decree, notice, or other claim or evidence upon which the existing right was initiated or is based.

(3) Declarations shall be sent to the department by certified mail, with a return receipt requested. The re-

turn receipt is conclusive evidence of receipt, by the department, of the declaration.

History: En. Sec. 8, Ch. 452, L. 1973; amd. Sec. 1, Ch. 265, L. 1974; amd. Sec. 3, Ch. 485, L. 1975.

89-873. Filing of petition. (1) Proceedings for the determination of existing rights shall be commenced by the department in the district court of the judicial district in which the source or area is located. The department shall request by petition, and the district court shall issue an order requiring each person claiming an existing right within a specified area or from a specified source to file a declaration as provided in section 89-872.

(2) If the source or area is in two (2) or more judicial districts, the department shall notify the district court of each of the judicial districts of its intent to file the petition. Within thirty (30) days of receipt of the notice, the judges of those district courts shall agree on which district shall receive the petition and shall notify the department of their decision. If the district judges fail to agree or to notify the department, the department shall file the petition in the district court of the judicial district in which it determines that the greatest number of existing rights are likely to be located.

History: En. Sec. 9, Ch. 452, L. 1973; amd. Sec. 4, Ch. 485, L. 1975.

89-874. Contents of petition. (1) Within a reasonable time after gathering all data necessary under section 89-871, the department shall file with the district court the names of all persons who have filed declarations under section 89-872 and of all other persons who appear from the data gathered by the department to have existing

rights to the use of waters within the specified area or from the specified source.

(2) The department shall also file with the district court all data gathered under section 89-871.

(3) If the district court determines that additional data is necessary prior to issuing the preliminary decree in order to determine the extent of an existing right, it may direct the department or the person claiming the right to obtain the necessary data.

History: En. Sec. 10, Ch. 452, L. 1973; amd. Sec. 5, Ch. 485, L. 1975.

89-875. Preliminary decree. (1) Within a reasonable time after the department files with the district court the material required by section 89-874, the court shall issue a preliminary decree. The preliminary decree shall be based on the data submitted by the department and on any additional data obtained by the court.

(2) The preliminary decree shall contain the information, and make the determinations, findings, and conclusions, required for the final decree under section 89-877.

(3) The district court shall send a copy of the preliminary decree to the department, and the department shall serve by mail or by personal service a copy of the preliminary decree to each person named in the material submitted under section 89-874 or named in the preliminary decree. The department shall file proof of service with the district court.

(4) A person named in the material or in the preliminary decree may inspect the data upon which the de-

cree is based at any time, and he may purchase copies of any of the data.

History: En. Sec. 11, Ch. 452, L. 1973; amd. Sec. 6, Ch. 485, L. 1975; amd. Sec. 2, Ch. 416, L. 1977.

89-876. Hearing on preliminary decree. (1) The department or a person named in the material filed under section 89-874 or named in the preliminary decree, or any other person for good cause shown, who objects to the preliminary decree is entitled to a hearing thereon before the district court.

(2) A request for a hearing shall be filed with the district court, and a copy served on the department by certified mail, within ninety (90) days after receipt of the preliminary decree. The district court shall, for good cause shown, reasonably extend this time limit if application for the extension is made within ninety (90) days after receipt of the preliminary decree. A person requesting a hearing on his objections to the preliminary decree shall also serve, by certified mail with return receipt requested, a copy of his request on any person whose rights or priorities will be affected if the objections are sustained in the hearing. The rights and priorities of a person who is not served shall not be affected by the result of the hearing.

(3) The request for a hearing shall contain a precise statement of the findings and conclusions, in the preliminary decree, with which the person requesting the hearing disagrees. The request shall specify the paragraphs and pages containing the findings and conclusions to which objection is made. The request shall state the specific grounds and evidence on which the objections are based.

The request shall also state the names of all other persons on whom it is served.

(4) If more than one person requests a hearing on objections to the preliminary decree, the court may in its discretion hold a single hearing. Each hearing shall be conducted as are other civil actions, but the parties to the hearing may by agreement and with the court's permission waive any of the procedural or evidentiary rules, or may submit only written evidence. Only evidence which is referred to in a request may be introduced in a hearing.

(5) In each hearing, the department shall be a party and is entitled to be heard on objections made by any person. The department shall be granted adequate time, prior to a hearing, to gather evidence pertinent to any objection to be heard in the hearing.

History: En. Sec. 12, Ch. 452, L. 1973; amd. Sec. 7, Ch. 485, L. 1975.

89-877. Final decree. (1) The court shall, on the basis of the preliminary decree and on the basis of any hearing that may have been held, enter a final decree affirming or modifying the preliminary decree. If no request for a hearing is filed within the time allowed, the preliminary decree automatically becomes final, and the court shall enter it as the final decree.

(2) The final decree shall establish the existing rights and priorities, of the persons named in the petition, for the source or area under consideration.

(3) The final decree shall state the findings of fact, along with any conclusions of law, upon which the existing rights and priorities of each person named in the decree are based.

(4) For each person who is found to have an existing right, the final decree shall state:

(a) the name and post-office address of the owner of the right;

(b) the amount of water, rate and volume, included in the right;

(c) the date of priority of the right;

(d) the purpose for which the water included in the right is used;

(e) the place of use and a description of the land to which the right is appurtenant;

(f) the source of the water included in the right;

(g) the place and means of diversion;

(h) the approximate time during which the water is used each year;

(i) any other information necessary to fully define the nature and extent of the right.

(5) The final decree in each existing right determination is final and conclusive as to all existing rights in the source or area under consideration. After the final decree there shall be no existing rights to water in the area or source under consideration except as stated in the decree.

History: En. Sec. 13, Ch. 452, L. 1973; amd. Sec. 3, Ch. 416, L. 1977.

89-878. Appeals from final decree. (1) A person whose existing rights and priorities are determined in the final decree may appeal the determination only if:

(a) he requested a hearing and appeared and entered objections to the preliminary decree; or

(b) his rights as determined in the preliminary decree were altered as the result of a hearing, at which he appeared, requested by another person.

(2) An appeal from the final decree shall be taken as provided by the Montana Rules of Appellate Civil Procedure.

History: En. Sec. 14, Ch. 452, L. 1973.

89-879. Certificate of water right. When a final decree is entered, the court shall send a copy to the department. The department shall, on the basis of the final decree, issue to each person decreed an existing right a certificate of water right. The original of the certificate shall be sent to the county clerk and recorder, in the county where the point of diversion or place of use is located, for recordation. The department shall keep a copy of the certificate in its office in Helena. After recordation, the clerk and recorder shall send the certificate to the person to whom the right is decreed.

History: En. Sec. 15, Ch. 452, L. 1973.

89-880. Right to appropriate—application for permit. (1) After July 1, 1973, a person may not appropriate water except as provided in this act. A person may only appropriate water for a beneficial use. A right to appropriate water may not be acquired by any other method, including by adverse use, adverse possession, prescription or estoppel; the method prescribed by this act is exclusive.

(2) Except as otherwise provided in subsection (5) of this section, a person may not appropriate water or commence construction of diversion, impoundment, with-

drawal, or distribution works therefor except by applying for and receiving a permit from the department. The application shall be made on a form prescribed by the department. The department shall make the forms available through its offices and the offices of the county clerks and recorders. The department shall return a defective application for correction or completion together with the reasons for returning it. An application does not lose priority of filing because of defects, if the application is corrected, completed and refiled with the department within thirty (30) days after its return to the applicant, or within a further time as the department may allow. If an application is not corrected and completed within 30 days or within a further time as the department allows, up to 18 months, the priority date of the application shall be the date of refiling the application with the corrections with the department. An application not corrected within 18 months shall be terminated.

(3) The department may cease action upon an application for a permit and return it to the applicant when it finds that the application is not in good faith or does not show a bona fide intent to appropriate water for a beneficial use. An application returned for any of these reasons shall be accompanied by a statement of the reasons for which it was returned, and there shall be no right to a priority date based upon the filing of the application. Returning an application pursuant to this subsection shall be deemed a final decision of the department.

(4) A permit issued prior to a final determination of existing rights is provisional and is subject to that final determination. The amount of the appropriation granted

in a provisional permit shall be reduced or modified where necessary to protect and guarantee existing rights determined in the final decree. A person may not obtain any vested right, to an appropriation obtained under a provisional permit, by virtue of construction of diversion works, purchase of equipment to apply water, planting of crops, or other action, where the permit would have been denied or modified if the final decree had been available to the department.

(5) (a) Outside the boundaries of a controlled groundwater area, a permit is not required before appropriating groundwater by means of a well with a maximum yield of less than 100 gallons a minute. Within 60 days of completion of the well and appropriation of the groundwater for beneficial use, the appropriator shall file notice of completion on a form provided by the department at its offices and at the offices of the county clerks and recorders. Upon receipt of the notice, the department shall automatically issue a certificate of water right. The original of the certificate shall be sent to the county clerk and recorder, in the county where the point of diversion or place of use is located, for recordation. The department shall keep a copy of the certificate in its office in Helena. After recordation, the clerk and recorder shall send the certificate to the appropriator. The date of filing of the notice of completion is the date of priority of the right.

(b) A permit is not required before constructing an impoundment or pit and appropriating water for use by livestock if the maximum capacity of the impoundment or pit is less than 15 acre-feet and the appropriation is from a source other than a perennial flowing stream. As used

in this subsection, a perennial flowing stream means a stream which historically has flowed continuously at all seasons of the year, during dry as well as wet years. However, before constructing the impoundment or pit, the appropriator shall apply for a permit as prescribed by this act. If the department determines after processing the application that the rights of other appropriators have been or will be adversely affected, it may require the applicant to modify the construction of the impoundment or pit, and issue the permit subject to such terms, conditions, restrictions, or limitations it considers necessary to protect the rights of other appropriators.

(6) A person who desires to convert a nonproductive oil or gas well to a water well may do so immediately, but shall file a notice of completion or apply for a permit, depending on the maximum yield of the well, as otherwise provided in this act. The date of appropriation shall be the date of filing the notice of completion or the application for a permit.

(7) A person may also appropriate water, without applying for or prior to receiving a permit, under rules adopted by the board under section 89-869 of this act.

History: En. Sec. 16, Ch. 452, L. 1973; amd. Sec. 2, Ch. 238, L. 1974; amd. Sec. 8, Ch. 485, L. 1975; amd. Sec. 4, Ch. 416, L. 1977; amd. Sec. 1, Ch. 470, L. 1977.

89-881. Notice of application. (1) Upon receipt of a proper application for a permit, the department shall prepare a notice containing the facts pertinent to the application and shall publish the notice in a newspaper of general circulation in the area of the source once a week for three (3) consecutive weeks. Before the last date of publica-

tion, the department shall also serve the notice by certified mail upon an appropriator of water or applicant for or holder of a permit who, according to the records of the department, may be affected by the proposed appropriation. A notice shall also be served upon any public agency that has reserved waters in the source under section 89-890. The department may, in its discretion, also serve notice upon any state agency or other person the department feels may be interested in or affected by the proposed appropriation. The department shall file in its records proof of service by affidavit of the publisher in the case of notice by publication, and by its own affidavit in the case of service by mail.

(2) The notice shall state that by a date set by the department (not less than thirty (30) days nor more than sixty (60) days after the last date of publication) persons may file with the department written objections to the application.

(3) The requirements of subsections (1) and (2) of this section do not apply if the department finds, on the basis of information reasonably available to it, that the appropriation as proposed in the application will not adversely affect the rights of other persons.

History: En. Sec. 17, Ch. 452, L. 1973; amd. Sec. 9, Ch. 485, L. 1975.

89-882. Objections. (1) An objection to an application must be filed by the date specified by the department under section 17 (2) [89-881 (2)].

(2) The objection must state the name and address of the objector, and facts tending to show that there are no unappropriated waters in the proposed source, that the

proposed means of appropriation are inadequate, that the property, rights, or interests of the objector would be adversely affected by the proposed appropriation, or the objector may state any other objections to the proposed appropriation he considers pertinent.

History: En. Sec. 18, Ch. 452, L. 1973.

89-883. Hearings on objections. If the department determines that an objection to an application for a permit states a valid objection to the issuance of the permit, it shall hold a public hearing on the objection within sixty (60) days from the date set by the department for the filing of objections, after serving notice of the hearing by certified mail upon the applicant and the objector. The department may consolidate hearings if more than one (1) objection is filed to an application. The department shall file in its records proof of the service by affidavit of the department.

History: En. Sec. 19, Ch. 452, L. 1973.

89-884. Action on application. (1) The department shall grant, deny, or condition an application for a permit in whole or in part within one hundred twenty (120) days after the last date of publication of the notice of application if no hearing is held, and within one hundred eighty (180) days if a hearing is held; however, in either case the time may be extended upon agreement of the applicant, or, in those cases where an environmental impact statement must be prepared or in other extraordinary cases, not more than 60 days upon order of the department. If the department orders the time extended it shall serve a notice of the extension and the reasons therefor by certified mail upon the applicant and each person who has filed an objection as provided by section 89-882.

(2) However, an application may not be approved in a modified form or upon terms, conditions, or limitations specified by the department, nor denied, unless the applicant is first granted an opportunity to be heard. If no objection is filed against the application, but the department is of the opinion that the application should be approved in a modified form or upon terms, conditions or limitations specified by it, or that the application should be denied, the department shall prepare a statement of its opinion and the reasons therefor. The department shall serve a statement of its opinion by certified mail upon the applicant, together with a notice that the applicant may obtain a hearing by filing a request therefor within thirty (30) days after the notice is mailed. The notice shall further state that the application will be modified in a specified manner, or denied, unless a hearing is requested.

History: En. Sec. 20, Ch. 452, L. 1973; amd. Sec. 10, Ch. 485, L. 1975; amd. Sec. 5, Ch. 416, L. 1977.

89-885. Criteria for issuance of permit. The department shall issue a permit if:

(1) there are unappropriated waters in the source of supply:

(a) at times when the water can be put to the use proposed by the applicant;

(b) in the amount the applicant seeks to appropriate; and

(c) throughout the period during which the applicant seeks to appropriate, the amount requested is available;

(2) the rights of a prior appropriator will not be adversely affected;

(3) the proposed means of diversion or construction are adequate;

(4) the proposed use of water is a beneficial use;

(5) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved;

(6) an applicant for an appropriation of 10,000 acre-feet a year or more or 15 cubic feet per second or more proves by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected.

History: En. Sec. 21, Ch. 452, L. 1973; amd. Sec. 1, Ch. 156, L. 1975; amd. Sec. 1, Ch. 307, L. 1977; amd. Sec. 6, Ch. 416, L. 1977.

89-886. Terms of permit: (1) The department may issue a permit for less than the amount of water requested, but in no case may it issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and specifications for the appropriation or related diversion or construction. It may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to protect the rights of other appropriators, and it may issue temporary or seasonal permits. A permit shall be issued subject to existing rights and any final determination of those rights made under this act.

(2) The department may limit the time for commencement of the appropriation works, completion of construction and actual application of the water to the proposed beneficial use. In fixing those time limits, the department shall consider the cost and magnitude of the

project, the engineering and physical features to be encountered, and, on projects designed for gradual development and gradually increased use of water, the time reasonably necessary for that gradual development and increased use. For good cause shown by the permittee, the department may in its discretion reasonably extend time limits.

(3) The original of the permit shall be sent to the county clerk and recorder in the county where the point of diversion or place of use is located for recordation, and a copy shall be kept in the office of the department in Helena. After recordation, the clerk and recorder shall send the permit to the permittee.

History: En. Sec. 22, Ch. 452, L. 1973.

89-887. Revocation of permit. If the work on an appropriation is not commenced, prosecuted, or completed within the time stated in the permit or an extension thereof, or if the water is not being applied to the beneficial use contemplated in the permit, or if the permit is otherwise not being followed, the department may after notice require the permittee to show cause why the permit should not be revoked. If the permittee fails to show sufficient cause, the department may revoke the permit.

History: En. Sec. 23, Ch. 452, L. 1973.

89-888. Certificate of water right. (1) Upon actual application of water to the proposed beneficial use within the time allowed, the permittee shall notify the department that the appropriation has been properly completed. The department may then inspect the appropriation, and if it determines that the appropriation has been completed in substantial accordance with the permit, it shall issue the

permittee a certificate of water right. The original of the certificate shall be sent to the county clerk and recorder in the county wherein the point of diversion or place of use is located for recordation, and a duplicate shall be kept in the office of the department in Helena. After recordation, the clerk and recorder shall send the certificate to the appropriator.

(2) Except as provided in section 16 (4) [89-880 (4)] of this act, a certificate of water right in a particular source may not be issued prior to a general determination under this act of existing rights in that source.

History: En. Sec. 24, Ch. 452, L. 1973.

89-889. Reservoirs. A person intending to appropriate water by means of a reservoir shall apply for a permit as prescribed in this act.

History: En. Sec. 25, Ch. 452, L. 1973.

89-890. Reservation of waters. (1) The state or any political subdivision or agency thereof, or the United States or any agency thereof, may apply to the board to reserve waters for existing or future beneficial uses, or to maintain a minimum flow, level, or quality of water throughout the year or at such periods or for such length of time as the board designates.

(2) Upon receiving an application, the department shall proceed in accordance with sections 89-881 through 89-883. After the hearing provided in section 89-883, the board shall decide whether to reserve the water for the applicant. The department's costs of giving notice, holding the hearing, conducting investigations, and making records, incurred in acting upon the application to reserve

water, except the cost of salaries of the department's personnel, shall be paid by the applicant.

(3) The board may not adopt an order reserving water unless the applicant establishes to the satisfaction of the board:

(a) the purpose of the reservation;

(b) the need for the reservation;

(c) the amount of water necessary for the purpose of the reservation;

(d) that the reservation is in the public interest. If the purpose of the reservation requires construction of a storage or diversion facility, the applicant shall establish to the satisfaction of the board that there will be progress toward completion of the facility and accomplishment of the purpose with reasonable diligence in accordance with an established plan.

(4) After the adoption of an order reserving waters, the department may reject an application and refuse a permit for the appropriation of reserved waters, or may, with the approval of the board, issue the permit subject to such terms and conditions it considers necessary for the protection of the objectives of the reservation.

(5) A reservation under this section shall date from the date the order reserving the water is adopted by the board, and shall not adversely affect any rights in existence at that time.

(6) The board shall, periodically but at least once every 10 years, review existing reservations to ensure that the objectives of the reservation are being met. Where the

objectives of the reservation are not being met, the board may extend, revoke or modify the reservation.

History: En. Sec. 26, Ch. 452, L. 1973; amd. Sec. 11, Ch. 485, L. 1975; amd. Sec. 7, Ch. 416, L. 1977.

89-891. Priority. (1) As between appropriators, the first in time is the first in right. Priority of appropriation does not include the right to prevent changes by later appropriators in the condition of water occurrence, such as the increase or decrease of streamflow, or the lowering of a water table, artesian pressure or water level, if the prior appropriator can reasonably exercise his water right under the changed conditions.

(2) Priority of appropriation made under this act dates from the filing of an application for a permit with the department, except as otherwise provided in section 16 [89-880] of this act.

(3) Priority of appropriation perfected before the effective date of this act shall be determined as provided in sections 6 through 15 [89-870 through 89-879] of this act.

History: En. Sec. 27, Ch. 452, L. 1973.

89-891.1. Water turned into natural channels. Water appropriated under an existing right or pursuant to this act may be turned into the natural channel of another stream, or from a reservoir into the natural channel, and withdrawn or diverted at a point downstream for beneficial use, but the waters of that stream may not thereby be diminished in quantity or deteriorated in quality to the detriment of a prior appropriator. Water stored in a reservoir under an existing right or pursuant to this act which is turned into a natural channel for withdrawal or diver-

sion and beneficial use downstream shall not be considered a part of the natural flow of that stream.

History: En. 89-891.1 by Sec. 1, Ch. 103, L. 1974.

89-892. Changes in appropriation rights. (1) An appropriator may not change the place of diversion, place of use, purpose of use or place of storage except as permitted under this section and approved by the department.

(2) The department shall approve the proposed change if it determines that the proposed change will not adversely affect the rights of other persons. If the department determines that the proposed change might adversely affect the rights of other persons, notice of the proposed change shall be given in accordance with section 89-881. If the department determines that an objection filed by a person whose rights may be affected states a valid objection to the proposed change, the department shall hold a hearing thereon prior to its approval or denial of the proposed change. Objections shall meet the requirements of section 89-882 (2), and hearings shall be held in accordance with section 89-883.

(3) An appropriator of more than fifteen (15) cubic feet per second may not change the purpose of use of an appropriation right from an agricultural use to an industrial use.

(4) The department may approve a change subject to such terms, conditions, restrictions, and limitations it considers necessary to protect the rights of other appropriators, including limitations on the time for completion of the change.

(5) If a change is not completed as approved by the department or if the terms, conditions, restrictions, and

limitations of the change approval are not complied with, the department may, after notice and opportunity for hearing, require the appropriator to show cause why the change approval should not be modified or revoked. If the appropriator fails to show sufficient cause, the department may modify or revoke the change approval.

History: En. Sec. 28, Ch. 452, L. 1973; amd. Sec. 3, Ch. 238, L. 1974; amd. Sec. 1, Ch. 338, L. 1975; amd. Sec. 8, Ch. 416, L. 1977.

89-893. Transfer of appropriation right. (1) The right to use water under a permit or certificate of water right shall pass with a conveyance of the land, or transfer by operation of law, unless specifically exempted therefrom. All transfers of interests in appropriation rights shall be without loss of priority.

(2) The person receiving the appropriation interest shall file with the department notice of the transfer on a form prescribed by the department.

(3) An appropriator may not sever all or any part of an appropriation right from the land to which it is appurtenant, or sell the appropriation right for other purposes or to other lands, or make the appropriation right appurtenant to other lands, without obtaining prior approval from the department. The department shall approve the proposed change if it determines that the proposed change will not adversely affect the rights of other persons. If the department determines that the proposed change might adversely affect the rights of other persons, notice of the proposed change shall be given in accordance with section 89-881. If the department then determines that an objection filed by a person whose rights may be affected states a valid objection to the proposed change,

the department shall hold a hearing thereon prior to its approval or denial of the proposed change. Objections shall meet the requirements of section 89-882 (2) and hearings shall be held in accordance with section 89-883.

History: En. Sec. 29, Ch. 452, L. 1973; amd. Sec. 4, Ch. 238, L. 1974.

89-894. Abandonment of appropriation right. (1) If an appropriator ceases to use all or a part of his appropriation right with the intention of wholly or partially abandoning the right, or if he ceases using his appropriation right according to its terms and conditions with the intention of not complying with those terms and conditions, the appropriation right shall, to that extent, be deemed considered abandoned and shall immediately expire.

(2) If an appropriator ceases to use all or part of his appropriation right, or ceases using his appropriation right according to its terms and conditions, for a period of ten (10) successive years, and there was water available for his use, there shall be a prima facie presumption that the appropriator has abandoned his right in whole or for the part not used.

(3) This section does not apply to existing rights until they have been determined in accordance with this act.

History: En. Sec. 30, Ch. 452, L. 1973.

89-895. Procedure for declaring appropriation rights abandoned. (1) When the department has reason to believe that an appropriator may have abandoned his appropriation right under section 30 [89-894], or when another appropriator in the opinion of the department files a valid claim that he has been or will be injured by the re-

sumption of use of an appropriation right alleged to have been abandoned, the department shall petition the district court which determined the existing rights in the source of the appropriation in question to hold a hearing to determine whether the appropriation right has been abandoned. Proceedings under this section shall be conducted in accordance with the Montana Rules of Civil Procedure, and appeal shall be taken in accordance with the Montana Rules of Appellate Civil Procedure.

(2) At the hearing, the burden of proof shall be on the department which must establish by a preponderance of the evidence that the appropriation has been abandoned under section 30 [89-894] of this act.

(3) The determination of the court shall be appended to the final decree. The department shall keep a copy of the determination in its office in Helena.

History: En. Sec. 31, Ch. 452, L. 1973.

89-896. Supervision of water distribution. (1) The district courts shall supervise the distribution of water among all appropriators. This supervisory authority includes the supervision of all water commissioners appointed prior or subsequent to the effective date of this act. The supervision shall be governed by the principle that first in time is first in right.

(2) When a water distribution controversy arises upon a source of water in which existing rights have not been determined according to sections 89-870 through 89-879, any party to the controversy may petition the district court for relief. The department shall be served with process in any proceeding under this subsection and shall, within a reasonable time thereafter, notify the court wheth-

or it intends in its discretion, within a reasonable time, to begin proceedings to determine existing rights in the source, in accordance with this act. The department may, if it declines to commence proceedings to determine existing rights in the source, intervene as a party in the proceeding. The district court from which relief is sought may grant such injunctive or other relief which is necessary and appropriate to preserve property rights or the status quo pending the department's decision whether to determine existing rights in the source, or the department's decision to intervene as a party, as the case may be. If the department does not proceed to obtain a determination of existing rights, the district court shall settle only the controversy between the parties.

(3) A controversy between appropriators from a source which has been the subject of a general determination of existing rights under sections 89-870 through 89-879 shall be settled by the district court which issued the final decree. The order of the district court settling the controversy may not alter the existing rights and priorities established in the final decree. In cases involving permits issued by the department, the court may not amend the respective rights established in the permits or alter any terms of the permits unless the permits are inconsistent or interfere with rights and priorities established in the final decree. The order settling the controversy shall be appended to the final decree, and a copy shall be filed with the department. The department shall be served with process in any proceeding under this subsection, and the department may, in its discretion, intervene in the proceeding.

History: En. Sec. 32, Ch. 452, L. 1973; amd. Sec. 12, Ch. 485, L. 1975.

89-897. Prevention of waste. (1) If the department ascertains, by a means reasonably considered sufficient by it, that a person is wasting water, using water unlawfully, or preventing water from moving to another person having a prior right to use the same, it may petition the district court to:

(a) regulate the controlling works of an appropriation as may be necessary to prevent the wasting or unlawful use of water, or to secure water to a person having a prior right to its use; the department may attach to the controlling works a written notice properly dated and signed, setting forth the fact that the controlling works have been properly regulated by it, which notice shall be legal notice to all persons interested in the appropriation or distribution of the water; or

(b) order the person wasting, unlawfully using, or interfering with another's rightful use of the water to cease and desist from doing so, and to take such steps as may be necessary to remedy the waste, unlawful use, or interference; or

(2) The department may also direct its own attorney or request the attorney general or county attorney to bring suit to enjoin such waste, unlawful use, or interference.

History: En. Sec. 33, Ch. 452, L. 1973.

89-898. Entry on land—inspections. Any employee or agent of the department authorized by the director may enter upon any land to carry out the purpose of this act, including, but not limited to, entry to make inspections the department considers necessary of proposed works, source of water, location of the proposed use, construc-

tion of works and other inspections to ascertain whether or not persons are complying with this act. The department or its agent shall give reasonable notice to the landowner of its intention to enter upon the land. The department is responsible for actual damages done to any property.

History: En. Sec. 34, Ch. 452, L. 1973.

89-899. Legal assistance. (1) When requested by the department, the attorney general and the county attorneys within their respective counties shall perform legal services and conduct legal proceedings necessary to carry out the purposes of this chapter. The department may also employ legal counsel to enforce this chapter and to conduct proceedings under it.

(2) If an appropriator who is a citizen of Montana becomes involved in a controversy to which any agency of the federal government or another state is a party, the department may in its discretion intervene as a party or provide necessary legal assistance to the citizen of Montana.

History: En. Sec. 35, Ch. 452, L. 1973; amd. Sec. 9, Ch. 460, L. 1977.

89-8-100. Administrative proceedings. The Montana Administrative Procedure Act (Title 82, chapter 42, R.C.M. 1947) governs administrative proceedings conducted under this act, except that the common law and statutory rules of evidence shall apply only upon stipulation of all parties to a proceeding.

History: En. Sec. 36, Ch. 452, L. 1973; amd. Sec. 13, Ch. 485, L. 1975; amd. Sec. 9, Ch. 416, L. 1977.

89-8-100.1. Recovery of attorney fees by prevailing party. If a final decision of the department on an application for a permit is appealed to district court, the district court shall award the prevailing party reasonable attorney fees.

History: En. 89-8-100.1 by Sec. 11, Ch. 416, L. 1977.

89-8-101. Penalties. A person who violates or refuses or neglects to comply with sections 16 (1), 28 (1), and 29 (3) [89-880 (1), 89-892 (1), and 89-893 (3)] of this act, or of any order of the department, or of any rule of the board, is guilty of a misdemeanor.

History: En. Sec. 37, Ch. 452, L. 1973.

89-8-102. Deposit of fees and penalties. All fees and penalties collected under this act shall be deposited in the state general fund. All penalties or fines imposed by any court for a violation of this act shall be deposited in the general fund of the county where the court presides and shall be disposed of in the same manner as any other penalty or fine.

History: En. Sec. 38, Ch. 452, L. 1973.

89-8-102.1. Saving clause. Nothing in this act abates or otherwise adversely affects the validity of any filing, notice, or judicial proceeding commenced under the law as it existed before July 1, 1973.

History: En. 89-8-102.1 by Sec. 14, Ch. 485, L. 1975.

89-8-102.2. Fees for environmental impact statements. (1) Whenever the department determines that the filing of an application (or a combination of applications) for a permit or approval under this chapter requires the

preparation of an environmental impact statement as prescribed by the Montana Environmental Policy Act (Title 69, chapter 65, R.C.M. 1947), and the application (or combination of applications) involves the use of ten thousand (10,000) or more acre feet per year or fifteen (15) or more cubic feet per second of water, the applicant shall pay to the department the fee prescribed in this section. The department shall notify the applicant in writing within thirty (30) days of receipt of a correct and complete application (or a combination of applications), if it determines that an environmental impact statement and fee is required.

(2) Upon notification by the department under subsection (1) of this section, the applicant shall pay a fee based upon the estimated cost of constructing, repairing or changing the appropriation and diversion facilities as herein provided. The maximum fee that shall be paid to the department may not exceed the fees set forth in the following declining scale: two percent (2%) of the estimated cost up to one million dollars ($1,000,000); plus one percent (1%) of the estimated cost over one million dollars ($1,000,000) and up to twenty million dollars ($20,000,000); plus one-half of one percent (0.5%) of the estimated cost over twenty million dollars ($20,000,000) and up to one hundred million dollars ($100,000,000); plus one-quarter of one percent (0.25%) of the estimated cost over one hundred million dollars ($100,000,000) and up to three hundred million dollars ($300,000,000); plus one-eighth of one percent (.125%) of the estimated cost over three hundred million dollars ($300,000,000). The fee shall be deposited in the earmarked revenue fund to be used by the department only to comply with the Montana Environmental Policy Act in connection with the appli-

cation(s). Any amounts paid by the applicant but not actually expended by the department shall be refunded to the applicant.

(3) The department and the applicant may determine by agreement the estimated cost of any facility for purposes of computing the amount of the fee to be paid to the department by the applicant. The department may contract with an applicant for:

(a) the development of information by the applicant or a third party on behalf of the department and the applicant concerning the environmental impact of any proposed activity under an application;

(b) the division of responsibility between the department and an applicant for supervision over, control of, and payment for the development of information by the applicant or a third party on behalf of the department and the applicant under any such contract or contracts;

(c) the use or nonuse of a fee or any part thereof paid to the department by an applicant.

(4) Any payments made to the department or any third party by an applicant under any such contract or contracts shall be credited against any fee the applicant must pay hereunder. The department and the applicant may agree on additional credits against the fee for environmental work performed by the applicant's own expense.

(5) No fee as prescribed by this section may be assessed against an applicant for a permit or approval if the applicant has also filed an application for a cer-

tificate of environmental compatibility or public need pursuant to the Montana Major Facility Siting Act (Title 70, chapter 8, R.C.M. 1947), and the appropriation or use of water involved in the application(s) for permit or approval has been or will be studied by the department pursuant to that act.

(6) This act shall apply to all applications, pending or hereinafter filed, for which the department has not, as of the effective date of this act, commenced writing an environmental impact statement. This act shall not apply to any application the fee for which would not exceed two thousand five hundred dollars ($2,500).

(7) Failure to submit the fee as required by this section shall void the application(s).

(8) The department may, in its discretion, rely upon the environmental studies, investigations, reports, and assessments made by any other state agency or any person, including any applicant, in the preparation of its environmental impact statement.

History: En. 89-8-102.2 by Sec. 1, Ch. 356, L. 1975; amd. Sec. 1, Ch. 117, L. 1977.

89-8-103. Statement of legislative findings and policy. The legislature, noting that appropriations have been claimed, that applications have been filed for, and that there is further widespread interest in making substantial appropriations of water in the Yellowstone River Basin, finds that these appropriations threaten the depletion of Montana's water resources to the significant detriment of existing and projected agricultural, municipal, recreational and other uses, and of wildlife and aquatic habitat. The legislature further finds that these appro-

priations foreclose the options to the people of this state to utilize water for other future beneficial purposes, including municipal water supplies, irrigation systems, and minimum flows for the protection of existing rights and aquatic life. The legislature pursuant to its mandate and authority under article IX of the Montana constitution, declares that it is the policy of this state that before these proposed appropriations are acted upon existing rights to water in the Yellowstone basin must be accurately determined for their protection, and that reservations of water within the basin must be established as rapidly as possible for the preservation and protection of existing and future beneficial uses.

History: En. 89-8-103 by Sec. 1, Ch. 116, L. 1974.

89-8-104. Definitions. Unless the context clearly requires otherwise, in this act:

(1) "Department" means the department of natural resources and conservation.

(2) "Basin" means the Yellowstone River Basin.

(3) "Application" means an application for a permit under the Montana Water Use Act to appropriate surface water from any source of supply within the basin for either or both of the following purposes:

(a) a reservoir with a total planned capacity of fourteen thousand (14,000) acre feet or more, or

(b) for a flow rate greater than twenty (20) cubic feet of water per second.

The term also includes an application for approval under section 89-892, R.C.M. 1947, to change the purpose of use.

(4) "Reservation" means a reservation of water provided for by section 89-890 of the Montana Water Use Act.

History: En. 89-8-104 by Sec. 2, Ch. 116, L. 1974.

89-8-105. Suspension of action. (1) The department may not grant or otherwise take any action on an application until one of the following first occurs:

(a) the board of natural resources and conservation makes a final determination on the applications for reservations of water in the basin filed before January 1, 1977, in accordance with 89-890;

(b) a final determination of existing rights has been made in the source of supply in accordance with the Montant Water Use Act; or

(c) January 1, 1978; however, if a court stays or enjoins the continuance of proceedings on any pending application for reservation of water in the basin filed before January 1, 1977, and such stay or injunction prevents the board from making a final determination on such application before January 1, 1978, the court shall extend this date by the length of delay incurred. The court may not extend this date beyond January 15, 1979.

(2) A reservation established before such application for permit is granted is a preferred use over the right to appropriate water pursuant to the permit, and the permit, if granted, shall be issued subject to that preferred use.

History: En. 89-8-105 by Sec. 3, Ch. 116, L. 1974; amd. Sec. 1, Ch. 26, L. 1977.

89-8-106. When department may suspend action. The department may suspend action on applications not meet-

ing the definition of application in section 2 [89-8-104] of this act if it determines, after a public hearing conducted under the contested case procedures of the Montana Administrative Procedure Act, that the cumulative impact of those applications, if granted, would be contrary to the policies and purposes of this act. If the department suspends action on such applications, the provisions of section 8 [89-8-105] of this act apply.

History: En. 89-8-106 by Sec. 4, Ch. 116, L. 1974.

89-8-107. Reservations. The department may apply for reservations and shall, as rapidly as possible, assist other appropriate state agencies and political subdivisions in applying for reservations within the basin. The United States or any agency thereof may apply for reservation of water in the basin under section 89-890, R.C.M. 1947, for beneficial use of that water in the State of Montana. Particular emphasis shall be given to applications to reserve water for agricultural, municipal, and minimum flow purposes for the protection of existing rights and aquatic life.

History: En. 89-8-107 by Sec. 5, Ch. 116, L. 1974; amd. Sec. 10, Ch. 416, L. 1977.

89-8-108. Application of act. This act applies to applications currently pending with the department, as well as applications filed with the department after the effective date of this act.

History: En. 89-8-108 by Sec. 6, Ch. 116, L. 1974.

89-8-109. Utility facilities. This act does not apply to applications to appropriate water for use by a utility facility for which a certificate of environmental compati-

bility and public need is granted pursuant to the Montana Utility Siting Act of 1973.

History: En. 89-8-109 by Sec. 7, Ch. 116, L. 1974.

89-8-110. Certain changes of use allowed. Notwithstanding any provision of this act, the department may approve a change of purpose of use to agricultural, irrigation, domestic and municipal uses if it determines that the change is not contrary to the policies and purposes of this act.

History: En. 89-8-110 by Sec. 8, Ch. 116, L. 1974.

89-8-111. Severability. If a part of this [act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

History: En. 89-8-111 by Sec. 9, Ch. 116, L. 1974.

APPENDIX G

SENATE BILL 76, LAWS OF MONTANA (1979)

CHAPTER NO. 697

AN ACT TO ADJUDICATE CLAIMS OF EXISTING WATER RIGHTS IN MONTANA; AMENDING SECTIONS 3-5-111, 85-2-102, 85-2-112, 85-2-113, 85-2-114, 85-2-401, AND 85-2-406, MCA; REPEALING SECTIONS 85-2-201 THROUGH 85-2-210, MCA; AND PROVIDING AN EFFECTIVE DATE.

Be it enacted by the Legislature of the State of Montana:

Section 1. Purpose—district court water divisions—water judges—creation. (1) [This act] amends the Montana Water Use Act to expedite and facilitate the adjudication of existing water rights.

(2) To adjudicate existing water rights water divisions are established as defined in [section 2]. A water division shall be presided over by a water judge. [§ 3-7-101, MCA.]

(3) A water judge shall be designated within 30 days after [the effective date of this act] for each water division by a majority vote of a committee composed of the district judge from each single judge judicial district and the chief district judge from each multiple judge judicial district, wholly or partly within the division. A water judge must be a district judge of a judicial district wholly or partly within the water division. A district judge may not sit as a water judge in more than one division [§ 3-7-201 (1), MCA.]

(4) No water judge may preside over matters concerning the determination and interpretation of existing water rights beyond the boundaries specified in [section

2] for his division. [§ 3-7-501 (2), MCA; amd. Sec. 4, Ch. 80, L. 1981.]

(5) A water judge, when presiding over a water division, presides as district judge in and for each judicial district wholly or partly within the water divison. [§ 3-7-501 (3), MCA; amd. Sec. 4, Ch. 80, L. 1981.]

(6) The jurisdiction of each judicial district concerning the determination and interpretation of existing water rights is exercised exclusively by it through the water division or water divisions that contain the judicial district wholly or partly. [§ 3-7-501 (1), MCA.]

Section 2. Water divisions defined. (1) There are four water divisions whose boundaries are formed by the natural divides between drainages and the borders of the state of Montana and which are described as follows:

(a) The Yellowstone River Basin water division consists of those areas drained by the Yellowstone and Little Missouri Rivers and any remaining areas in Carter County.

(b) The lower Missouri River Basin water division consists of those areas drained by the Missouri River from below the mouth of the Marias River and any remaining areas in Glacier and Sheridan Counties.

(c) The upper Missouri River Basin water division consists of those areas drained by the Missouri River to below the mouth of the Marias River.

(d) The Clark Fork River Basin water division consists of the areas drained by the Clark Fork River, the Kootenai River, and any remaining areas in Lincoln County. [§ 3-7-102, MCA.]

(2) Whenever a question arises concerning which water judge shall preside over adjudication of a matter concerning the determination and interpretation of existing water rights, the question shall be settled by the water judges involved [§ 3-7-502, MCA.]

Section 3. Appointment of water masters—qualifications—removal. (1) The water judge in each water division shall appoint a water master.

(2) A water master may be appointed after July 1, 1980, and must be appointed on or before July 1, 1982.

(3) In appointing a water master, the water judge shall consider a potential master's experience with water law, water use, and water rights.

(4) A water master shall serve at the pleasure of the water judge and may be removed by the water judge. [§ 3-7-301, MCA; amd. Sec. 2, Ch. 268, L. 1981.]

Section 4. Salary, expenses, and retirement of water masters. (1) The water judges shall set a uniform salary for water masters. Water masters shall receive expenses as provided in 2-18-501 through 2-18-503.

(2) A water master shall participate in the Montana Public Employees' Retirement System established in Title 19, chapter 3.

(3) The salary and expenses of a water master shall be paid from the water right adjudication account established in [section 18]. [§ 85-2-241, MCA.]

Section 5. Duties of water masters. (1) The water master has the general powers given to a master by M. R. Civ. P., Rule 53 (c).

(2) Within a reasonable time after June 30, 1983, the water master shall issue a report to the water judge meeting the requirements for the preliminary decree as specified in [section 22]. [§ 85-2-231, MCA.]

(3) After a water judge issues a preliminary decree, the water master shall assist the water judge in the performance of the water division's further duties as ordered by the water judge. [§ 3-7-311, MCA.]

Section 6. Jurisdiction of the water divisions. (1) The action for the adjudication of all existing water rights under [this act] is commenced with the issuing of the order by the Montana supreme court to file a statement of a claim of an existing water right as provided in [section 16]. As to each claim, the action is considered filed in the judicial district of the county in which the diversion is made or, if there is a claimed right with no diversion, in the judicial district of the county in which the use occurs. [§ 85-2-2140, MCA.]

(2) The water judge for each division shall exercise jurisdiction over all matters concerning the determination and interpretation of existing water rights within his division as specified in [section 2] that are considered filed in or transferred to a judicial district wholly or partly within the division. [§ 3-7-501 (3), MCA; amd. Sec. 4, Ch. 80, L. 1981.]

(3) The water judge may consolidate all matters concerning the determination and interpretation of existing water rights within the water judge's division in any combination or groups of claims or matters for joint hear-

ings or proceedings conducted by the water judge or water master in any location within the division. The water judge may make such consolidations as are necessary to administer the requirements of [this act] in adjudicating claims of existing water rights. [§ 85-2-215, M.C.A.]

(4) All matters concerning the determination and interpretation of existing water rights shall be brought before or immediately transferred to the water judge in the proper water division unless witnesses have been sworn and testimony has been taken by a district court prior to the date of the Montana supreme court order as provided in [section 16] [§ 85-2-212, MCA.]

(5) The water judge of each water division may appoint and supervise a water commissioner as provided for in Title 85, chapter. [§ 3-7-211, MCA.]

(6) The water judge of each water division may enforce the provisions of a final decree issued in that water division as provided in [section 24]. [§ 85-2-234, MCA.]

(7) The water judge may designate any other district judge within the water division to preside in his absence on his behalf as water judge for the immediate enforcement of an existing decree or the immediate granting of extraordinary relief as may be provided for by law upon an allegation of irreparable harm. [§ 3-7-213, MCA; amd. Sec. 3, Ch. 80, L. 1981.]

Section 7. Disqualification of water judges or water master. (1) A water judge may disqualify himself or the water master in any proceeding or pertinent portion

thereof in which his or the water master's impartiality might reasonably be questioned.

(2) A water judge may also disqualify himself or the water master in the following circumstances:

(a) if he or the water master has a personal bias or prejudice concerning a party of personal knowledge or disputed evidentiary facts concerning the proceeding;

(b) if in private practice he or the water master served as a lawyer in the matter in controversy or a lawyer with whom he or the water master previously practiced law served during such association as a lawyer concerning the matter or the judge or the lawyer has been a material witness concerning it;

(c) if he or the water master has served in governmental employment and in such capacity participated as counsel, adviser, or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(d) if he or the water master knows that he or the water master individually or as a fiduciary, or his or the water master's spouse or minor child residing in his or the water master's household has a financial interest in the subject matter in controversy or in a party to the proceeding or any other interest that could be substantially affected by the outcome of the proceeding; or

(e) if he or the water master or his or the water master's spouse or a person within the third degree of relationship to any of them (as calculated according to 72-11-101 through 72-11-105) or the spouse of such a person:

(i) is a party to the proceeding or an officer, director, or trustee of a party;

(ii) is known by the judge or water master to have an interest that could be substantially affected by the outcome of the proceeding;

(iii) is to the judge's or water master's knowledge likely to be a material witness in the proceeding.

(3) A water judge should inform himself about his and the water master's personal and fiduciary financial interests and make a reasonable effort to inform himself about the personal financial interests of his and the water master's spouse and minor children residing in his or the water master's respective household. [§ 3-7-402, MCA.]

(4) For the purposes of this section, the following definitions apply:

(a) "Proceeding" includes prehearing, hearing, appellate review, or other stages of adjudication conducted by the water master or water judge.

(b) "Fiduciary" includes such relationships as executor, administrator, trustee, or guardian.

(c) "Financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a financial interest in such securities unless the judge or water master participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a financial interest in securities held by the organization;

(iii) the proprietary interest of a policyholder in a mutual insurance company or a depositor in a mutual savings association or a similar proprietary interest is a financial interest in the organization only if the outcome of the proceeding could substantially affect the value of the interest; and

(iv) ownership of government securities is a financial interest in the issuer only if the outcome of the proceeding could substantially affect the value of the securities. [§ 3-7-401, MCA.]

(5) A water judge may accept from the parties to the proceeding a waiver of any ground for disqualification if it is preceded by a full disclosure on the record of the basis for disqualification. [§ 3-7-403, MCA.]

(6) The procedure for disqualification of a water judge or water master specified in this section is exclusive unless otherwise specifically altered by the Montana supreme court. [§ 3-7-404, MCA.]

Section 8. Designation of water judge to fill vacancy. If a vacancy occurs, it shall be filled in the manner provided in [section 1] for the initial designation of a water judge. A vacancy is created when a water judge dies, retires, is not elected to a subsequent term, forfeits his judicial position, is removed, or is otherwise unable to complete his term as a district judge. [§ 3-7-203, MCA, amd. Sec. 2, Ch. 80, L. 1981.]

Section 9. Water judges—term of office. The term of office for water judges is from the date of initial appointment as provided in [section 1] to June 30, 1985. After June 30, 1985, the term of office of a water judge is 4 years, subject to continuation of the water divisions by the legislature. [§ 3-7-202, MCA.]

Section 10. Promulgation of rules and prescription of forms. As soon as practicable the Montana supreme court may promulgate special rules of practice and procedure and shall prescribe forms for use in connection with [this act] in consultation with the water judge and the department. [§ 3-7-103, MCA; amd. Sec. 16, Ch. 575, L. 1981.]

Section 11. Claim of existing water right—filing statement of claim required—exemptions. (1) A person claiming an existing right, unless exempted below or unless an earlier filing date is ordered as provided in [section 16], shall file with the department no later than June 30, 1983, a statement of claim for each water right asserted on a form provided by the department.

(2) The department shall file a copy of each statement of claim with the clerk of the district court for the judicial district in which the diversion is made or, if there is a claimed right with no diversion, the department shall file a copy of the statement of claim with the clerk of the district court of the judicial district in which the use occurs. [§ 85-2-221, MCA.]

(3) Claims for existing rights for livestock and individual as opposed to municipal domestic use based upon instream flow or groundwater sources and claims for rights in the Powder River Basin included in a declara-

tion filed pursuant to the order of the department or a district court issued under sections 8 and 9 of Chapter 452, Laws of 1973, or under sections 3 and 4 of Chapter 485, Laws of 1975, are exempt from the filing requirements of subsection (1) of this section. Such claims may, however, be voluntarily filed. [§ 85-2-222, MCA.]

Section 12. Department of fish and game to represent public recreational uses. The department of fish and game shall exclusively represent the public for purposes of establishing any prior and existing public recreational use in existing right determinations under [sections 11 through 26], provided that the foregoing shall not exclude a federal governmental entity from representing the public for the purpose of establishing any prior and existing public recreational use in existing right determinations under [sections 11 through 26] and further provided that the foregoing shall not be construed in any manner as a legislative determination of whether or not a recreational use sought to be established prior to July 1, 1973, is or was a beneficial use. [§ 85-2-223, MCA.]

Section 13. Statement of claim—contents. (1) The statement of claim for each right shall include substantially the following:

(a) the name and mailing address of the claimant;

(b) the name of the watercourse or water source from which the right to divert or make use of water is claimed, if available;

(c) the quantities of water and times of use claimed;

(d) the legal description, with reasonable certainty, of the point or points of diversion and places of use of waters;

(e) the purpose of use, including, if for irrigation, the number of acres irrigated;

(f) the approximate dates of first putting water to beneficial use for the various amounts and times claimed in subsection (e); and

(g) the sworn statement that the claim set forth is true and correct to the best of claimant's knowledge and belief.

(2) The claimant shall submit maps, plats, aerial photographs, decrees, or pertinent portions thereof, or other evidence in support of his claim. All maps, plats, or aerial photographs should show as nearly as possible to scale the point of diversion, place of use, place of storage, and other pertinent conveyance facilities. [§ 85-2-224, MCA.]

Section 14. Abandonment by failure to file claim. The failure to file a claim of an existing right as required by [section 11] establishes a conclusive presumption of abandonment of that right. [§ 85-2-226, MCA.]

Section 15. Claim to constitute prima facie evidence. A claim of an existing right filed in accordance with [section 11] constitutes prima facie proof of its content until the issuance of a final decree. [§ 85-2-227, MCA.]

Section 16. Order to file claim. (1) The Montana supreme court shall within 10 days of the filing of the petition by the attorney general issue an order to file a statement of a claim of an existing water right in substantially the following form:

"WATER RIGHTS ORDER

FAILURE TO FILE A CLAIM AS REQUIRED BY LAW WILL RESULT IN A CONCLUSIVE PRESUMPTION THAT THE WATER RIGHT OR CLAIMED WATER RIGHT HAS BEEN ABANDONED. (This introductory sentence shall be printed in not less than 12-point boldface type.) This order is notice of commencement of procedures for the general adjudication of existing rights to the use of water and of the requirement to file a claim for certain existing rights to the use of water. Every person, including but not limited to an individual, partnership, association, public or private corporation, city or other municipality, county, state agency or the state of Montana, and federal agency of the United States of America on its own behalf or as trustee for any Indian or Indian tribe, asserting a claim to an existing right to the use of water arising prior to July 1, 1973, is ordered to file a statement of claim to that right with the department no later than June 30, 1982. Claims for stock and individual as opposed to municipal domestic uses based upon instream flow or groundwater sources are exempt from this requirement; however, claims for such uses may be voluntarily filed. Claims filed with the department in the Powder River Basin in a declaration filed pursuant to the order of the department of natural resources and conservation or a district court issued pursuant to sections 8 and 9 of Chapter 452, Laws of 1973, or under sections 3 and 4 of Chapter 425, Laws of 1975, are also exempt.

For further information, contact the department of natural resources and conservation, Helena, Montana, for a copy of the law and an explanation of it."

(2) Upon petition of the attorney general, the Montana supreme court shall issue the order called for in subsection (1) with a shorter claim filing period of not less than 1 year, subject to extension not beyond June 30, 1983, by the Montana supreme court upon petition of the attorney general, in those basins or subbasins where state adjudication jurisdiction is being or is likely to be challenged. [§ 85-2-212, MCA.]

Section 17. How notice of the order to be given. To assure that all persons who may claim an existing water right are notified of the requirement to file a claim of that right, the Montana supreme court shall give notice of the order as follows:

(1) It shall cause the order printed in not less than 10-point type to be placed in a prominent and conspicuous place in all daily newspapers of the state and in at least one newspaper published in each county of the state within 30 days after the Montana supreme court order as provided in [section 16] and in April of 1980, 1981, 1982, and 1983.

(2) It shall cause the order in writing to be placed in a prominent and conspicuous location in each county courthouse in the state within 30 days after the Montana supreme court order as provided in [section 16].

(3) It shall provide a sufficient number of copies of the order to the county treasurers before October 15, 1979, 1980, 1981, and 1982, and the county treasurers shall enclose a copy of the order with each statement of property taxes mailed in 1979, 1980, 1981, and 1982. In the implementation of this subsection, the department shall provide reimbursement to each county treasurer for the

reasonable additional costs incurred by the treasurer arising from the inclusion of the order required by this section. The department shall be reimbursed for such costs from the water right adjudication account created by [section 18].

(4) It shall provide copies of the order in writing to the press services with offices located in Helena within 30 days after the Montana supreme court order as provided in [section 16], and in April of 1980, 1981, 1982, and 1983.

(5) It shall, under authority granted to the states by 43 U.S.C. 666, provide for service of the petition and order upon the United States attorney general or his designated representative.

(6) It may also in its discretion give notice of the order in any other manner that will carry out the purposes of this section.

(7) It may also in its discretion order that the department or the water judge assist the Montana supreme court in the carrying out of this section. [§ 85-2-213, MCA.]

Section 18. Fees—special account created. (1) Each claim filed under [section 11] shall be accompanied by a filing fee in the amount of $40, subject to the following exceptions:

(a) the total filing fees for all claims filed by one person in any one water court division may not exceed $480; and

(b) no filing fee is required accompanying a claim of an existing right that is included in a decree of a court

in the state of Montana and which is accompanied by a certified copy of that decree or pertinent portion thereof or verified as otherwise ordered by the court. [§ 85-2-225, MCA; amd. Sec. 1, Ch. 253, L. 1981.]

(2) There is established a water right adjudication account in the ear-marked revenue fund of the state treasury. All fees collected under this section and [section 22] shall be deposited in the account to pay the expenses incurred by the state for administering [this act]. [§ 85-2-241, MCA.]

Section 19. Expenses to be borne by state. All expenses incurred by the state as a result of [this act] are to be paid from the water right adjudication account in the earmarked revenue fund established in [section 18].

Expenses include but are not limited to the salaries and expenses of personnel, equipment, office space, and other necessities incurred in administering [this act]. If sufficient revenue is not available from the earmarked revenue fund, the expense shall be paid from the state's general fund. [§ 85-2-242, MCA.]

Section 20. Adjudication of existing rights. (1) Within 20 days after [the effective date of this act], the state of Montana upon relation of the attorney general shall petition the Montana supreme court to require all persons claiming a right within a water division to file a claim of the right as provided in [section 11]. [§ 85-2-211, MCA.]

(2) The water judge shall monitor the claim filing procedure for claims within his water division and make

any orders necessary to assure timely and accurate compliance with the claim filing procedure. [§ 85-2-214 (2), MCA.]

Section 21. Department assistance to water judges. The department, subject to the direction of the water judge, shall, without cost to the judicial districts wholly or partly within his water division:

(1) provide such information and assistance as may be required by the water judge to adjudicate claims of existing rights;

(2) establish information and assistance programs to aid claimants in the filing of claims for existing rights required by [section 11];

(3) conduct field investigations of claims that the water judge in consultation with the department determines warrant investigation; and

(4) provide the water judge with all information in its possession bearing upon existing rights, including all declarations filed with and all information gathered by the department with respect to existing rights in the Powder River Basin. [§ 85-2-243, MCA.]

Section 22. Preliminary decree. (1) Within a reasonable time after the close of the filing period, the water judge shall issue a preliminary decree. The preliminary decree shall be based on the statements of claim before the water judge, the data submitted by the department, and any additional data obtained by the water judge.

(2) The preliminary decree shall contain the information and make the determinations, findings, and conclusions required for the final decree under [section 24].

(3) If the water judge is satisfied that the report of the water master meets the requirements for the preliminary decree set forth in subsections (1) and (2), and is satisfied with the conclusions contained in the report, the water judge shall adopt the report as the preliminary decree. If the water judge is not so satisfied, he may, at his option, recommit the report to the master with instructions, or modify the report and issue the preliminary decree. [§ 85-2-231, MCA; amd. Sec. 6, Ch. 268, L. 1981.]

(4) The water judge shall send a copy of the preliminary decree to the department, and the water judge shall serve by mail a notice of availability of the preliminary decree to each person who has filed a claim of existing right, or, in the Powder River Basin, to each person who has filed a declaration of an existing right. The water judge shall enclose with the notice an abstract of the disposition of such person's claimed or declared existing right. The notice of availability shall also be served upon those issued or having applied for and not having been denied a beneficial water use permit pursuant to Title 85, chapter 2, part 3, those granted a reservation pursuant to 85-2-316, or other interested persons who request service of the notice from the water judge. The clerk or person designated by the water judge to mail the notice shall make a general certificate of mailing certifying that a copy of the notice has been placed in the United States mail, postage prepaid, addressed to each party required to be served notice of the preliminary decree. Such certificate shall be conclusive evidence of due and legal notice of entry of decree.

(5) Any person may obtain a copy of the preliminary decree upon payment of a fee of $20 or the cost of

printing, which ever is greater, to the water judge. [§ 85-2-232, MCA.]

Section 23. Hearing on preliminary decree. (1) Upon objection to the preliminary decree by the department, a person named in the preliminary decree, or any other person, for good cause shown, the department or such person is entitled to a hearing thereon before the water judge.

(2) If a hearing is requested, such request must be filed with the water judge within 90 days after notice of entry of the preliminary decree. The water judge may, for good cause shown, extend this time limit an additional 30 days if application for the extension is made within 90 days after notice of entry of the preliminary decree.

(3) The request for a hearing shall contain a precise statement of the findings and conclusions in the preliminary decree with which the department or person requesting the hearing disagrees. The request shall specify the paragraphs and pages containing the findings and conclusions to which objection is made. The request shall state the specific grounds and evidence on which the objections are based.

(4) Upon expiration of the time for filing objections and upon timely receipt of a request for a hearing, the water judge shall notify each party named in the preliminary decree that a hearing has been requested. The water judge shall fix a day when all parties who wish to participate in future proceedings must appear or file a statement. The water judge shall then set a date for a hearing. The water judge may conduct individual or consolidated hearings. A hearing shall be conducted as for

other civil actions. At the order of the water judge a hearing may be conducted by the water master, who shall prepare a report of the hearing as provided in M.R.Civ.P., Rule 53(e). [§ 85-2-233, MCA; amd. Sec. 7, Ch. 268, L. 1981.]

Section 24. Final decree. (1) The water judge shall, on the basis of the preliminary decree and on the basis of any hearing that may have been held, enter a final decree affirming or modifying the preliminary decree. If no request for a hearing is filed within the time allowed, the preliminary decree automatically becomes final, and the water judge shall enter it as the final decree.

(2) The final decree shall establish the existing rights and priorities within the water judge's jurisdiction of persons required by [section 11] to file a claim for an existing right and of persons required to file a declaration of existing rights in the Powder River Basin pursuant to an order of the department or a district court issued under sections 8 and 9 of Chapter 452, Laws of 1973.

(3) The final decree shall state the findings of fact, along with any conclusions of law, upon which the existing rights and priorities of each person named in the decree are based.

(4) For each person who is found to have an existing right, the final decree shall state:

(a) the name and post-office address of the owner of the right;

(b) the amount of water, rate, and volume, included in the right;

(c) the date of priority of the right;

(d) the purpose for which the water included in the right is used;

(e) the place of use and a description of the land, if any, to which the right is appurtenant;

(f) the source of the water included in the right;

(g) the place and means of diversion;

(h) the inclusive dates during which the water is used each year;

(i) any other information necessary to fully define the nature and extent of the right. [§ 85-2-234, MCA.]

Section 25. Appeals from final decree. A person whose existing rights and priorities are determined in the final decree may appeal the determination only if:

(1) he requested a hearing and appeared and entered objections to the preliminary decree; or

(2) his rights as determined in the preliminary decree were altered as the result of a hearing requested by another person. [§ 85-2-235, MCA.]

Section 26. Certificate of water right. When a final decree is entered, the water judge shall send a copy to the department. The department shall on the basis of the final decree issue a certificate of water right to each person decreed an existing right. The original of the certificate shall be sent to the county clerk and recorder of the county where the point of diversion or place of use is located for recordation. The department shall keep a copy of the certificate in its office in Helena. After re-

cordation, the clerk and recorder shall send the certificate to the person to whom the right is decreed. [§ 85-2-236, MCA.]

Section 27. Legislative intent regarding Indian water rights—suspension of adjudication—negotiation of compacts authorized—procedure—negotiation of federal rights. (1) Because the water and water rights within each water division are interrelated, it is the intent of the legislature to conduct unified proceedings for the general adjudication of existing water rights under the Montana Water Use Act. Therefore, it is the intent of the legislature that the attorney general's petition required in [section 16] include all claimants of reserved Indian water rights as necessary and indispensable parties under authority granted the state by 43 U.S.C. 666. However, it is further intended that the state of Montana proceed under the provisions of this section in an effort to conclude compacts for the equitable division and apportionment of waters between the state and its people and the several Indian tribes claiming reserved water rights within the state. [§ 85-2-701, MCA.]

(2) From the time of filing the petition required in [section 16] until July 1, 1982, and while negotiations for the conclusion of a compact under this section are being pursued, all actions to generally adjudicate reserved Indian water rights from a source of water in question under [this act] are suspended, unless an action is commenced or is pending by or on behalf of an Indian tribe to adjudicate water from that source other than as provided for in Title 85, chapter 2. In such case, the suspension is maintained only if the action is dismissed or if the parties to the action

stipulate to the suspension during compact negotiations of all further proceedings in the action except the determination of jurisdictional issues and an order is so issued. [§ 85-2-217, MCA; amd. Sec. 4, Ch. 268, L. 1981.]

(3) The compact commission may negotiate with the Indian tribes or their authorized representatives jointly or severally to conclude compacts authorized under subsection (1). Compact proceedings shall be commenced by the commission. The commission shall serve by certified mail directed to the governing body of each tribe a written request for the initiation of negotiations under [this act] and a request for the designation of an authorized representative of the tribe to conduct compact negotiations. Upon receipt of such written designation from the governing body of a tribe, compact negotiations shall be considered to have commenced. When the compact commission and the Indian tribes or their authorized representatives have agreed to a compact, they shall sign a copy and file an original copy with the department of state of the United States of America and copies with the secretary of state of Montana and with the governing body for the tribe involved. The compact is effective and binding upon all parties upon ratification by the legislature of Montana, any affected tribal governing body, and the congress of the United States. The water judge shall include in the preliminary decree the contents of a compact that has been agreed upon by the parties to the compact whether or not it has been ratified by congress. [§ 85-2-702, MCA; amd. Sec. 8, Ch. 268, L. 1981.]

(4) (a) There is created a reserved water rights compact commission. Commissioners are appointed within 30 days of [the effective date of this act] as follows:

(i) two members of the house of representatives appointed by the speaker, each from a different political party;

(ii) two members of the senate appointed by the president, each from a different political party;

(iii) four members designated by the governor; and

(iv) one member designated by the attorney general.

(b) Legislative members of the commission are entitled to receive compensation and expenses as provided in 5-2-301 for each day actually spent on commission business. Other members are entitled to salary and expenses as state employees.

(c) The commission is attached to the governor's office for administrative purposes only. The costs of the commission shall be paid from funds appropriated for that purpose from the water right adjudication account established in [section 19].

(d) Members appointed to the commission shall serve until the work of the commission is completed or until they resign or are otherwise unable to serve. A vacancy must be filled in the manner of the original appointment. [§ 2-15-212, MCA.]

(5) The commission or any other party to the negotiations may terminate negotiations by providing notice to all parties 30 days in advance of the termination date. On the termination date, the suspension of the application of [this act] provided for in subsection (2) shall also terminate. [§ 85-2-704, MCA; amd. Sec. 9, Ch. 268, L. 1981.]

(6) The compact commission may also enter into separate negotiations with the federal government for the

conclusion of compacts concerning the equitable division and apportionment of water between the state and its people and the federal government claiming non-Indian reserved waters within the state. The terms and conditions of such negotiations shall be the same as provided in this section for negotiations with Indian tribes. [§ 85-2-703, MCA.]

Section 28. Section 3-5-111, MCA, is amended to read:

"3-5-111. District courts presided over by judges of other districts. A judge of the district court of any judicial district may hold the district court in any county of another district than his own at the request of the judge thereof *or as otherwise provided by law*. Upon the request of the governor, it is his duty to do so. In either case the judge holding the court has the same power either in court or chambers as a judge thereof."

Section 29. Section 85-2-102, MCA, is amended to read:

"85-2-102. Definitions. Unless the context requires otherwise, in this chapter the following definitions apply:

(1) "Appropriate" means to divert, impound, or withdraw (including by stock for stock water) a quantity of water or, in the case of a public agency, to reserve water in accordance with 85-2-316.

(2) "Beneficial use" means a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses. A use of water for slurry to export coal from Montana is not a beneficial use. Slurry is a mixture of water and insoluble matter.

(3) "Board" means the board of natural resources and conservation provided for in 2-15-3302.

(4) "Certificate" means a certificate of water right issued by the department.

(5) "Declaration" means the declaration of an existing right filed with the department under section 8, Chapter 452, Laws of 1973.

(6) "Department" means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33.

(7) "Existing right" means a right to the use of water which would be protected under the law as it existed prior to July 1, 1973.

(8) "Groundwater" means any water beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water, and which is not a part of that surface water.

(9) "Permit" means the permit to appropriate issued by the department under 85-2-301 through 85-2-303 and 85-2-306 through 85-2-314.

(10) "Person" means an individual, association, partnership, corporation, state agency, political subdivision, the United States or any agency thereof, or any other entity.

(11) "Political subdivision" means any county, incorporated city or town, public corporation, or district created pursuant to state law or other public body of the state empowered to appropriate water but not a private corporation, association, or group.

(12) "Waste" means the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

(13) "Water" means all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including geothermal water and diffuse surface water.

(14) "Water division" means a drainage basin as defined in [section 2].

(15) "Water judge" means a judge as provided for in [sections 1 through 10].

(16) "Water master" means a master as provided for in [sections 1 through 10].

(17) "Well" means any artificial opening or excavation in the ground, however made, by which groundwater is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn."

Section 30. Section 85-2-112, MCA, is amended to read:

"85-2-112. Department duties. The department shall:

(1) enforce and administer this chapter and rules adopted by the board under 85-2-113;

(2) prescribe procedures, forms, and requirements for applications, permits, certificates, declarations, claims of existing rights, and proceedings under this chapter and prescribe the information to be contained in any application, declaration, claim of existing right, or other docu-

ment to be filed with the department under this chapter not inconsistent with the requirements of this chapter;

(3) establish and keep in its Helena office a centralized record system of all existing rights and a public record of permits, certificates, declarations, claims of existing rights, applications, and other documents filed in its office under this chapter;

(4) cooperate with, assist, advise, and coordinate plans and activities with the federal, state, and local agencies in matters relating to this chapter;

(5) upon request by any person, cooperate with, assist, and advise that person in matters pertaining to measuring water or filing declarations with the department or claims of existing rights with a district court under this chapter."

Section 31. Section 85-2-113, MCA, is amended to read:

"85-2-113. Board powers and duties. (1) The board may prescribe fees or service charges for any public services rendered by the department under this chapter, including fees for the filing of applications or for the issuance of permits and certificates. There shall be no fees for the filing of declarations or for any action taken by the department at the request of the water judge or for the issuance of certificates of existing rights.

(2) The board may adopt rules necessary to implement and carry out the purposes and provisions of this chapter. These rules may include but are not limited to rules to:

(a) govern the issuance and terms of interim permits authorizing an applicant for a regular permit under this chapter to begin appropriating water immediately, pending final approval or denial by the department of the application for a regular permit;

(b) require the owner or operator of appropriation facilities to install and maintain suitable controlling and measuring devices;

(c) require the owner or operator of appropriation facilities to report to the department the readings of measuring devices at reasonable intervals and to file reports on appropriations; and

(d) regulate the construction, use, and sealing of wells to prevent the waste, contamination, or pollution of groundwater.

(3) The board shall adopt rules providing for and governing temporary emergency appropriations, without prior application for a permit, necessary to protect lives or property."

Section 32. Section 85-2-114, MCA, is amended to read:

"85-2-114. Prevention of waste. (1) If the department ascertains, by a means reasonably considered sufficient by it, that a person is wasting water, using water unlawfully, or preventing water from moving to another person having a prior right to use the same, it may petition the district court supervising the distribution of water among appropriators from the source to:

(a) regulate the controlling works of an appropriation as may be necessary to prevent the wasting or unlaw-

ful use of water or to secure water to a person having a prior right to its use; or

(b) order the person wasting, unlawfully using, or interfering with another's rightful use of the water to cease and desist from doing so and to take such steps as may be necessary to remedy the waste, unlawful use, or interference.

(2) The department may attach to the controlling works a written notice, properly dated and signed, setting forth the fact that the controlling works have been properly regulated by it, which notice shall be legal notice to all persons interested in the appropriation or distribution of the water.

(3) The department may also direct its own attorney or request the attorney general or county attorney to bring suit to enjoin such waste, unlawful use, or interference."

Section 33. Section 85-2-401, MCA, is amended to read:

"85-2-401. Priority. (1) As between appropriators, the first in time is the first in right. Priority of appropriation does not include the right to prevent changes by later appropriators in the condition of water occurrence, such as the increase or decrease of streamflow or the lowering of a water table, artesian pressure, or water level, if the prior appropriator can reasonably exercise his water right under the changed conditions.

(2) Priority of appropriation made under this chapter dates from the filing of an application for a permit with the department, except as otherwise provided in 85-2-301 through 85-2-303, 85-2-306, 85-2-310 (3), and 85-2-313.

(3) Priority of appropriation perfected before July 1, 1973, shall be determined as provided in *part 2 of this chapter.*"

Section 34. Section 85-2-406, MCA, is amended to read:

"85-2-406. District court supervision of water distribution. (1) The district courts shall supervise the distribution of water among all appropriators. This supervisory authority includes the supervision of all water commissioners appointed prior or subsequent to July 1, 1973. The supervision shall be governed by the principle that first in time is first in right.

(2) When a water distribution controversy arises upon a source of water in which existing rights have not been determined according to *part 2 of this chapter*, any party to the controversy may petition the district court for relief. The district court from which relief is sought may grant such injunctive or other relief which is necessary and appropriate to preserve property rights or the status quo pending the *issuance of the final decree.*

(3) A controversy between appropriators from a source which has been the subject of a general determination of existing rights under *part 2 of this chapter* shall be settled by the district court which issued the final decree. The order of the district court settling the controversy may not alter the existing rights and priorities established in the final decree. In cases involving permits issued by the department, the court may not amend the respective rights established in the permits or alter any terms of the permits unless the permits are inconsistent or interfere with rights and priorities established in the final decree. The order settling the controversy shall be

appended to the final decree, and a copy shall be filed with the department. The department shall be served with process in any proceeding under this subsection, and the department may, in its discretion, intervene in the proceeding."

Section 35. Codification. (1) Sections 1 through 10 of this act are intended to be codified as an integral part of Title 3, and the provisions contained in Title 3 apply to this act.

(2) Sections 11 through 27 are intended to be codified as an integral part of Title 85, chapter 2, part 2, and the provisions contained in Title 85, chapter 2, apply to this act.

(3) If the provisions of this act are not codified as stated above, the code commissioner shall add to the MCA, if necessary, statutory language to convey the intent of this section.

Section 36. Severability. If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Section 37. Repealer. Sections 85-2-201 through 85-2-210, MCA, are repealed.

Section 38. Effective date. This act is effective on passage and approval.

Approved May 11, 1979.

APPENDIX B

United States' Petition to the Montana Supreme Court and Orders of the Montana Supreme Court attached as exhibits:

IN THE SUPREME COURT FOR THE STATE OF MONTANA

No. 14833

IN THE MATTER OF THE PETITION OF THE UNITED STATES OF AMERICA FOR A STAY OF PROCEEDINGS UNDER THE MONTANA WATER USE ACT OR IN THE ALTERNATIVE AN ORDER ENLARGING THE TIME FOR FILING STATEMENTS OF CLAIMS TO THE USE OF WATER IN MONTANA

[Filed April 19, 1982]

This matter comes before this Court on the United States' petition for a stay of the proceeding under the Montana Water Use Act, MCA 85-2-101, *et seq.*, or in the alternative an enlargement of time within which to file statements of claims to the use of water within the State of Montana, to and including June 30, 1983. The United States supports its petition for the following reasons.

I

Introduction

In 1975 and 1979, six lawsuits were filed by the United States in the United States District Court for the District

of Montana to adjudicate, *inter alia*, the water rights held by the United States for its own use and for the benefit of certain Indian tribes and their members in the waters of streams traversing or adjacent to federal lands and Indian reservations.[1] These cases sought to adjudicate the rights of other users, *inter sese*, as well. See, *Northern Cheyenne Tribe v. Tongue River Water Users' Association, et al.*, 484 F. Supp. 31 (D. Mont. 1979). The State of Montana and other parties filed motions to dismiss and in 1979, the federal district court dismissed the actions filed by the United States. *Id.*

On February 22, 1982 the United States Court of Appeals for the Ninth Circuit reversed the district court, holding that the State of Montana was without jurisdiction to adjudicate Indian water rights. See, *Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, et al. v. Adsit*, 668 F. 2d 1080 (9th Cir. 1982). A copy of that Opinion is attached hereto. Recently, the State of Montana declared its intention to petition the United States Supreme Court to review the Ninth Circuit decision.

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1 There were two suits filed in 1975, *United States v. Tongue River Water Users' Association, et al.*, No. CV-75-20-BLG, (App. No. 80-3042) and *United States v. Big Horn Low Line Canal Co., et al.*, No. CV-75-34-BLG, (App. No. 80-3063). The remaining suits were filed in 1979, *United States v. Aasheim, et al.*, No. CV-79-40-GF, (App. No. 80-3061); *United States v. Aageson, et al.*, No. CV-79-21-GF, (App. No. 80-3044); *United States v. AMS Ranch, et al.*, No. CV-22-GF, (App. No. 80-3045); and *United States v. Abell, et al.*, No. CV-79-33-M, (App. No. 80-3080). The only Indian tribe that has formally brought suit in federal court to adjudicate the waters within its borders is the Northern Cheyenne Tribe. See, *Northern Cheyenne v. Tongue River Water Users' Association*, No. CV-75-6-BLG. The case was consolidated when the United States brought its action on behalf [sic] the Northern Cheyenne and Crow Tribes.

Approximately six months prior to the district court's decision to dismiss the United States' claims in *Northern Cheyenne, supra*, the State of Montana amended its Water Use Act. See, Montana Water Use Act, MCA 85-2-101, *et seq.* (as amended 1979) (hereinafter the "Act"). Under the Act, "the action for adjudication of . . . water rights" in the state is commenced by order of this Court requiring water rights claimants to file their statements of claims for the use of water within the State of Montana not later than June 30, 1983. *Id.*, Section 16(1), MCA 85-2-212(a). "Upon petition of the State Attorney General . . . a shorter claim filing period of not less than one year" can be named. *Id.*, Section 16(2), MCA 85-2-212(2). On June 8, 1979, this Court ordered claims to be filed by January 1, 1982. A copy of that Order is attached hereto as Exhibit A. On December 7, 1981, this Court issued an Order extending the January 1, 1982 date until April 30, 1982. A copy of that Order is attached as Exhibit B.

II

Argument

A. With the issuance of the *Adsit* decision, *supra*, state authority to adjudicate Indian reserved water rights in Montana has been rejected. While this Court is bound by lower federal court decisions interpreting federal law, see, *State v. City Council of the City of Butte, Montana*, 145 Mont. 316, 400 P. 2d 629 (1965); *State ex rel. Burlington Northern, Inc. v. District Court*, 169 Mont. 480, 548 P. 2d 1390 (1976); and *Audit Services, Inc. v. Stewart and Jones, Inc.*, 188 Mont. 41, 622 P. 2d 217 (1981), we submit that the issue of state jurisdiction will not be fi-

nally settled until the United States Supreme Court either denies *certiorari* or accepts the case and rules on the issue of jurisdiction. If the decision stands, we submit that it will prevent this Court from fully adjudicating all water rights initially made subject of this adjudication, see, Montana Water Use Act, MCA 85-2-101, *et seq.*[2] and may render the proceeding useless.[3]

The United States respectfully submits that the prudent course of action would be for this Court to stay all proceedings under the Montana Water Use Act until state jurisdiction can be resolved. This would entail deleting the deadline of April 30, 1982 for filing statements of claims for the use of water within the State of Montana and postpone said requirement pending the proceedings in *Northern Cheyenne Tribe, et al. v. Adsit, supra,* in the United States Supreme Court.

B. In the alternative, the United States respectfully requests this Court to exercise its authority under Section 16(2) of the Montana Water Use Act, MCA 85-2-212 (2), to extend the deadline for filing claims to June 30,

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2 The stated purpose of the Montana Water Use Act to develop and complete a "comprehensive state water plan" would not reach fruition if federal and Indian claims were not adjudicated along with those claims made by the citizens of this State.

3 Any decree issued which did not include both state and federal claims would always by [sic] subject to challenge by those who did not participate in the adjudication.

1983 or until 60 days after the issue in *Adsit* is decided, whichever is first.

Respectfully submitted this 14th day of April, 1982.

/s/ F. Patrick Barry
Attorney, Department of Justice
Land and Natural Resources Division
10th & Pennsylvania Avenue, N. W.
Washington, D. C. 20530
(202) 633-2045

EXHIBIT A

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 14833

IN THE MATTER OF THE PETITION OF THE STATE OF MONTANA FOR AN ORDER REQUIRING THE FILING OF STATEMENTS OF CLAIM TO THE USE OF WATER IN MONTANA.

WATER RIGHTS ORDER

[Filed June 8, 1979]

PER CURIAM:

A petition having been filed by the Attorney General of the State of Montana pursuant to Chapter 697, Laws of 1979, requesting, among other things, that this Court issue an order as provided therein within 10 days of the filing of his petition,

IT IS NOW ORDERED as follows pursuant to section 16, Chapter 697, Laws of 1979:

FAILURE TO FILE A CLAIM AS REQUIRED BY LAW WILL RESULT IN A CONCLUSIVE PRESUMPTION THAT THE WATER RIGHT OR CLAIMED WATER RIGHT HAS BEEN ABANDONED. (This introductory sentence shall be printed in not less than 12-point boldface type.) This order is notice of commencement of procedures for the general adjudication of exist-

ing rights to the use of water and of the requirement to file a claim for certain existing rights to the use of water. Every person, including but not limited to an individual, partnership, association, public or private corporation, city or other municipality, county, state agency or the state of Montana, and federal agency of the United States of America on its own behalf or as trustee for any Indian or Indian tribe, asserting a claim to an existing right to the use of water arising prior to July 1, 1973, is ordered to file a statement of claim to that right with the Department of Natural Resources and Conservation of the State of Montana no later than January 1, 1982. Claims for stock and individual as opposed to municipal domestic uses based upon instream flow or groundwater sources are exempt from this requirement; however, claims for such uses may be voluntarily filed. Claims filed with the department in the Powder River Basin in a declaration filed pursuant to the order of the Department of Natural Resources and Conservation or a district court issued pursuant to sections 3 and 9 of Chapter 452, Laws of 1973, or under sections 3 and 4 of Chapter 485, Laws of 1975, are also exempt.

For further information, contact the Department of Natural Resources and Conservation, Helena, Montana, for a copy of the law and an explanation of it.

DATED this 8th day of June, 1979.

/s/ Frank I. Haswell
Chief Justice
/s/ John C. Sheehy
/s/ John Conway Harrison
/s/ Daniel J. Shea
/s/ Gene B. Daly
Justices

EXHIBIT B

IN THE SUPREME COURT OF
THE STATE OF MONTANA

No. 14833

IN THE MATTER OF THE PETITION
OF THE ATTORNEY GENERAL FOR AN
ORDER REQUIRING THE FILING OF
STATEMENTS OF CLAIMS TO THE USE
OF WATER IN MONTANA

ORDER

[Filed December 7, 1981]

PER CURIAM:

Pursuant to the authority invested in us by Chapter 485, Session Laws of 1975, and following a hearing in the above-entitled matter,

IT IS ORDERED:

(1) The final date for filing statements of claims to existing rights to the use of water in this State arising prior to July 1, 1973, is hereby extended to Friday, April 30, 1982, at 5:00 p.m.

(2) No further extensions for filing statements of claims to such existing water rights will be granted.

(3) This order shall not apply to statements of claims to existing rights to the use of water arising prior to July 1, 1973, in the Powder River Basin of Montana.

(4) A formal written opinion of this Court will follow this order at a later time.

(5) The Clerk is directed to mail a true copy of this order to all persons who have filed written statements herein in connection with the petition of the Attorney General for extension of time or who have appeared at the hearing thereon.

(6) The Department of Natural Resources and Conservation shall cause a copy of this order, printed in not less than 10 point type, to be placed in a prominent and conspicuous place once each week for three successive weeks in all daily newspapers in the State of Montana, and in one weekly newspaper published in each county of the State within 30 days of the date hereof.

(7) The Department of Natural Resources and Conservation shall cause a copy of this order to be placed in a prominent and conspicuous place in each county courthouse in this State within 30 days of the date hereof.

(8) The Department of Natural Resources and Conservation shall provide copies of this order to the press services with offices located in Helena, Montana, within 30 days of the date hereof.

(9) The Attorney General shall, under the authority granted by 43 U.S.C. 666, provide for service of the

order upon the United States Attorney General or his designated representative.

DATED this 7th day of December, 1981.

/s/ **Frank I. Haswell**
Chief Justice
/s/ **Gene B. Daly**
/s/ **John Conway Harrison**
/s/ **Daniel J. Shea**
/s/ **John C. Sheehy**
/s/ **Frank B. Morrison, Jr.**
/s/ **Fred J. Weber**
Justices

APPENDIX 1

IN THE SUPREME COURT OF
THE STATE OF MONTANA

No. 14833

IN THE MATTER OF THE PETITION OF THE UNITED STATES OF AMERICA FOR A STAY OF PROCEEDINGS UNDER THE MONTANA WATER USE ACT OR IN THE ALTERNATIVE AN ORDER ENLARGING THE TIME FOR FILING STATEMENTS OF CLAIMS TO THE USE OF WATER IN MONTANA

ORDER

[Filed April 27, 1982]

PER CURIAM:

The United States of America has petitioned for a stay of proceedings under the Montana Water Use Act or in the alternative an enlargement of time within which to file statements of claims to the use of water within the State of Montana, to and including June 30, 1983. The Department of Natural Resources and Conservation of the State of Montana, the Attorney General of Montana and the Chief Water Judge have filed responses thereto. The Court has examined and considered the same, together with all legal memoranda.

IT IS NOW ORDERED:

1. The petition of the United States of America is denied.

2. The grounds of denial are:

(1) There has been no showing of a need for extension of the filing deadline. Indian water rights can be fully protected in the State court system under existing procedures. The pendency of federal litigation does not affect the State of Montana in proceeding to adjudicate non-Indian claims.

(2) The power to petition for extension of the filing deadline under section 85-2-212(2), MCA, must be on petition of the Attorney General and the Attorney General objects to the extension in this instance.

(3) To grant the extension would disrupt the legislative plan that has been in the process of implementation since 1979.

For these and other reasons not necessary to be expressed or discussed in this order, the petition of the United States for further extension of time is denied in all respects.

DATED this 27th day of April, 1982.

/s/ Frank I. Haswell
Chief Justice
/s/ Gene B. Daly
/s/ John Conway Harrison
/s/ Daniel J. Shea
/s/ John C. Sheehy
/s/ Frank B. Morrison, Jr.
/s/ Fred J. Weber
Justices

APPENDIX J

S. Rep. No. 755, 82nd Cong., 1st Sess. (1951)
Mr. McCarran, from the Committee on the Judiciary,
submitted the following

R E P O R T

[To accompany S. 18]

The Committee on the Judiciary, to which was referred the bill (S.18) to authorize suits against the United States to adjudicate and administer water rights, having considered the same, reports favorably thereon, with amendments, and recommends that the bill as amended, do pass.

Amendments

1. On page 1, strike out all that follows the colon in line 10 down to and including line 1, on page 2, and insert in lieu thereof the following:

Provided, That nothing in this Act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream. When the United States shall be a party to any such suit it shall be deemed to have waived any right to plead that the State laws are not applicable, or that the United States is not amenable thereto, by reason of the sovereignty of the United States, and the United States shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*,

2. At the end of the bill add the following new section:

Sec. 2. The head of every department or agency of the United States and of every corporation which is wholly owned by the United States shall, within two years from the effective date of this Act, cause to be filed with the Secretary of the Interior, in such form and detail as he shall prescribe, a complete list of all claims of right to the use by that department, agency, or corporation of the waters of any stream or other body of surface water in the United States for agricultural, silvicultural, horticultural, stock-water, municipal, domestic, industrial, mining, or military purposes, or the protection, cultivation, and propagation of fish and wildlife, or any other purpose involving a consumptive use of water, or for the production of hydroelectric or other power or energy. Said list shall be supplemented and revised promptly as new claims of right are made and existing claims are abandoned or otherwise disposed of. A catalogue of such claims shall be maintained by the Secretary and, except for items therein which are certified by the head of the claimant department, agency, or corporation to be of such importance to the national defense as to require secrecy, shall be open to inspection by the public and, subject to the same exception, copies thereof and of items therein shall be furnished by the Secretary upon payment of the cost thereof. The Secretary may make rules and regulations to carry out the purpose of this section.

Purpose

The purpose of the proposed legislation, as amended, is to permit the joinder of the United States as a party defendant in any suit for the adjudication of rights to the use of water of a river system or other source or for the administration of such rights where it appears that the United States is the owner or is in the process of ac-

quiring water rights by appropriation under State law, by purchase, exchange, or otherwise and that the United States is a necessary party to such suit.

Statement

Hearings were held on S. 18, and the committee is of the opinion that in order to understand the background of this legislation a resume of some of the history and decisions relating to the law of water rights would be of help.

The committee has taken note of the reports of the Department of Justice and the Department of the Interior printed below which oppose the legislation, but has concluded, after a consideration of all of the evidence available to the committee, that the legislation is meritorious.

There are two established doctrines relating to the law of water rights as it is applied in the United States today. The first is the riparian doctrine, which was inherited from England, and the second is the prior appropriation doctrine, which is founded in the customs and practices of the settlers and is uniformly recognized in the law of most of the western states.

The reason that there have been two doctrines lies in the volume of water which is available to particular sections of the country. The riparian doctrine generally has currency in localities where water is plentiful, and the prior appropriation doctrine is adhered to in those areas where water is at a premium. Under the riparian doctrine, the owner of land contigous to a stream has certain rights in the flow of the water by reason of his ownership of land. Under the doctrine of prior appropriation the first user of the water acquires a priority right

to continue the use, and the contiguity of land to the watercourse is not a factor. It can readily be seen that the western states are the ones which are susceptible to the doctrine of prior appropriation.

It will follow that the adjudication of water rights which might involve the United States would in most instances be confined to those states in which the doctrine of prior appropriation is applicable.

The doctrine of prior appropriation had its inception in the Western States early in the settlement of the West, being brought about by the arid and semi-arid character of such States. The doctrine that "first in time is first in right" to the beneficial use of the water in the streams of such States first became the law of appropriation by custom and was later sanctioned by constitutional and legislative enactment in 11 of the Western States. Under the law sanctioning the doctrine of "first in time is first in right," vast quantities of land in these States, beginning back in the territorial days, was brought under cultivation through the courage and hard work of those who homesteaded or otherwise secured farm and ranch lands and made appropriations of water with which to make such lands productive. Litigation with respect to the water rights developed early in the history of the right to the use of water by appropriation. Down through the years the courts of the respective States marked out the pathway whereby order was instituted in lieu of chaos. Rights were established, and all of this at the expense, trial, and labor of the pioneers of the West, without material aid from our United States Government until a much later time when irrigation projects were initiated by Congress through the Department of the Interior and

later the Bureau of Reclamation. Even then Congress was most careful not to upset, in any way, the irrigation and water laws of the Western States. In 1902 Congress wrote into the Federal Reclamation Act a strict admonition to the Secretary of the Interior. Section 8 of that act, being now section 383, title 43, United States Code, is in effect as follows:

> Vested rights and State laws unaffected.—Nothing in this chapter shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secrtary of the Interior, in carrying out the provisions of this chapter, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or any landowner, appropriator, or user of water in, to or from any interstate stream or the waters thereof.

It will be seen that in the Western States irrigation of the lands is essential to successful farming and ranching and failure by a landowner to receive the amount of water vested or adjudicated to him is likely to be fatal to his economic welfare.

In the arid Western States, for more than 80 years, the law has been that the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, which State is vested with the primary control thereof.

In 1877 the Congress, in the Desert Land Act of 1877 (19 Stat. L. 377, Ch. 107), severed the water from the land,

and the effect of such statute was thereafter that the land should be patented by the United States separate and apart from the water and that all the nonnavigable water should be reserved for the use of the public under the laws of the States and Territories named in the act. This statute was construed by the Supreme Court of the United States in *California-Oregon Power Co. v. Beaver Portland Cement Co.* (295 U. S. 142), in which the Court, inter alia, held:

> 1. Following the Desert Land Act of 1877, if not before, all non-navigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated States, including those since created out of territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect to riparian rights should obtain.
>
> 2. The terms of the statute, thus construed, must be read into every patent thereafter issued, with the same force as though expressly incorporated therein, with the result that the grantee will take the legal title to the land conveyed, and such title, and only such title, to the flowing waters thereon as shall be fixed or acknowledged by the customs, laws, and judicial decisions of the State of their location.
>
> 3. The effect of the statute was to sever all waters upon the public domain, not theretofore appropriated, from the land itself, and that a patent issued thereafter for lands in a desert-land State or Territory, under any of the land laws of the United States, carried with it, of its own force, no common-law right to the water flowing through or bordering upon the lands conveyed.

In the course of its opinion the Court said:

> The fair construction of the provision now under review is that Congress intended to establish the rule

that for the future the land should be patented seperately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the States and Territories named. The words that the water of all sources of water supply upon the public lands and not navigable "shall remain and be held free for the appropriation and use of the public" are not susceptible of any other construction. The only exception made is that in favor of existing rights; and the only rule spoken of is that of appropriation. It is hard to see how a more definite intention to sever the land and water could be evinced.

The Court further stated:

Nothing we have said is meant to suggest that the act, as we construe it, has the effect of curtailing the power of the States affected to legislate in respect of waters and water rights as they deem wise in the public interest. What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated States, including those since created out of the Territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common law rule in respect of riparian rights should obtain. For since Congress cannot enforce either rule upon any state, *Kansas v. Colorado* (206 U. S. 46, 94), the full power of choice must remain with the State.

It is interesting to note what the Court said in a marginal note on page 164 of the opinion:

In this connection it is not without significance that Congress, since the passage of the Desert Land Act, has repeatedly recognized the supremacy of State law in respect to the acquisition of water for the reclamation of public lands of the United States and lands of its Indian wards.

The effect and authority of the foregoing cited case was later followed by the Supreme Court in *Ickes v. Fox* (300 U.S. 82), decided February 1, 1937, wherein the Court said, at page 95.

> The Federal Government, as owner of the public domain, had the power to dispose of the land and water composing it together or separately; and by the Desert Land Act of 1877 (c. 107, 19 Stat. 377), if not before, Congress had severed the land and waters constituting the public domain and established the rule that for the future the lands should be patented separately. Acquisition of the Government title to a parcel of land was not to carry with it a water right; but all non-navigable waters were reserved for the use of the public under the laws of the various arid-land States. *California Power Co. v. Beaver Cement Co.* (295 U.S. 142, 162). And in those States, generally, including the State of Washington, it long has been established law that the right to the use of water can be acquired only by prior appropriation for a beneficial use; and that such right when thus obtained is a property right, which, when acquired for irrigation, becomes, by State law and here by express provision of the Reclamation Act as well, part and parcel of the land upon which it is applied.

It is therefore settled that in the arid Western States the law of appropriation is the law governing the right to acquire, use, administer and protect the public waters as provided in each such State.

It is most clear that where water rights have been adjudicated by a court and its final decree entered, or where such rights are in the course of adjudication by a court, the court adjudicating or having adjudicated such rights is the court possessing the jurisdiction to enter its orders and decrees with respect thereto and thereafter

to enforce the same by appropriate proceedings. In the administration of and the adjudication of water rights under State laws the State courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State courts. Unless Congress has removed such immunity by statutory enactment, the bar of immunity from suit still remains and any judgment or decree of the State court is ineffective as to the water right held by the United States. Congress has not removed the bar of immunity even in its own courts in suits wherein water rights acquired under State law are drawn in question. The bill (S. 18) was introduced for the very purpose of correcting this situation and the evils growing out of such immunity.

The committee believes that such a situation cannot help but result in a chaotic condition. Each water user under some State laws is required to pay a graduated fee or tax annually for the services of water commissioners. The commissioners must apportion the water to the decreed users thereof in accordance with their de-

creed rights, and are required to deny the use of water to any user who at a particular time is not in the priority for the available supply of water. Failure to comply with the lawful orders of the water commissioner subjects the offender to the administrative and penal orders of the court, usually issued in contempt proceedings. If a water user possessing a decreed water right is immune from suits and proceedings in the courts for the enforcement of valid decrees, then the years of building the water laws of the Western States in the earnest endeavor of their proponents to effect honest, fair and equitable division of the public waters will be seriously jeopardized.

If such a condition is to continue in the future it will result in a throw-back to the conditions that brought about the enactment of the statutory water laws, i.e., the necessity that the public waters so necessary to the economic welfare of the arid States be allotted in an equitable manner as possible to all users of the available supply thereof. It is said of such laws by the Supreme Court in the case of *Pacific Live Stock Co. v. Oregon Water Board* (241 U. S. 447):

> • • • All claimants are required to appear and prove their claims; no one can refuse without forfeiting his claim, and all have the same relation to the proceeding. It is intended to be universal and to result in a complete ascertainment of all existing rights, to the end, first, that the waters may be distributed, under public supervision, among the lawful claimants according to their respective rights without needless waste or controversy; second, that the rights of all may be evidenced by appropriate certificates and public records, always readily accessible, and may not be dependent upon the testimony of witnesses with its recognized infirmities and uncertain-

ties; and, third, that the amount of surplus or unclaimed water, if any, may be ascertained and rendered available to intending appropriators.

The committee is aware of the fact, as shown by the hearings, that the United States Government has acquired many lands and water rights in States that have the doctrine of prior appropriation. When these lands and water rights were acquired from the individuals the Government obtained no better rights than had the persons from whom the rights were obtained.

Since it is clear that the States have the control of the water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years.

It will be noted that the amendment to S. 18 provides that nothing in the act shall authorize the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream. This is done in order not to open up any controversies between the States as to water rights on an interstate stream by permitting the United States to be made a party thereto.

The committee is of the opinion that there is no valid reason why the United States should not be required to join in a proceeding when it is a necessary party and to be required to abide by the decisions of the Court in the same manner as if it were a private individual.

Senator Magnuson raised the question as to whether S. 18 could be used for the purpose of delaying or block-

ing a multiple-purpose development such as proposed for the Hells Canyon project on the Snake River in the Columbia Basin or other similar projects, stating that there was a possibility of an individual or group having water rights on that stream bringing suits to adjudicate their respective rights and therefore preventing the Bureau of Reclamation from going ahead with the Hells Canyon project while litigation is in process or pending. The committee, for the legislative history of this bill, definitely desires to repudiate any such intent which may be deduced from S. 18 and states that this is not the purpose and the intent of this legislation. Where reclamation projects have been authorized for the benefit of the water users and the public generally, they should proceed under the law as it exists at the present time and should the Government have reason to need the water of any particular user on a stream, that water should be obtained by condemnation proceedings as is already provided for by law. The committee can think of no particular reason why the more development of a project should be delayed or stopped by the passage of S. 18 and it is not so intended. An exchange of letters by Senator Magnuson and Senator McCarran dealing with this feature of the bill is hereto attached and made a part of this report.

Senator Magnuson also submitted an amendment to the bill which appears as section 2 of the bill. It requires the head of each department or agency of the United States and every corporation which is wholly owned by the United States to submit within a 2-year period of time to the Secretary of the Interior a complete list of all claims of right to use any stream or body of surface water in the United States. This list shall be supplemented properly

as new claims and rights are made or other claims are abandoned or otherwise disposed of. A catalog of such claims is to be maintained by the Secretary, which shall be open to the public inspection, except when they may be barred from such inspection by reason of secrecy required by national defense.

The committee is of the opinion that development of a catalog of this nature would be most salutary and that there should be a single depository where the water rights claims of the United States should be available for whatever purpose may be needed. This provision is not only helpful to all of the landowners who may be interested in the water rights of a particular stream but is exceedingly helpful to the United States in knowing where and how it can, on short notice, determine its holdings in this respect. This is a provision the committee believes should have been in force and effect long before now and believes that it will prove most helpful in the future administration and adjudication on questions of water rights, to say nothing of the incidental uses to which such a catalog may be made.

The committee, therefore, recommends that the bill S. 18, as amended, be considered favorably.

DEPARTMENT OF JUSTICE,
OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, August 3, 1951.

Hon. PAT MCCARRAN,

Chairman, Committee on the Judiciary,
United States Senate, Washington, D.C.

MY DEAR SENATOR: The Department of Justice is unable to recommend the enactment of the bill (S. 18) to

authorize suits against the United States to adjudicate and administer water rights.

This measure would permit the joinder of the United States as a defendant in any suit for the adjudication of rights to the use of water of a river system or other source or for the administration of such rights where it appears that the United States is the owner or is in the process of acquiring water rights and is a necessary party to such suit. It would also provide that the United States could effect the removal to the Federal court of any such suit in which it is a party and that no judgment for costs shall be entered against the United States in any such suit. The last provision of the bill would authorize the service of summons or other process in any such suit upon the Attorney General or his designated representative.

The general waiver of the immunity of the United States to suits involving water rights would seem objectionable. It is likely that such a general waiver would result in the piecemeal adjudication of water rights, in turn resulting in a multiplicity of actions, and the joinder of the United States in many actions in all of which it would be required to claim every right, which it could conceivably have or need, or subject itself to the possible loss of valuable rights on the theory of having split its cause of action. There is, moreover, no reason to believe that in any instance in which it is desirable to do so, Congress would fail to authorize making the United States a party defendant in the litigation of water rights.

The Director of the Bureau of the Budget has advised this office that there would be no objection to the submission of this report.

Yours sincerely,

PEYTON FORD,
Deputy Attorney General.

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington 25, D. C., August 8, 1951.

Hon. PAT MCCARRAN,
Chairman, Committee on the Judiciary,
United States Senate, Washington 25, D. C.

MY DEAR SENATOR MCCARRAN: Reference is made to your request of April 27 for the views of this Department on S. 18, a bill to authorize suits against the United States to adjudicate and administer water rights.

I recommend that the bill be not enacted.

While there are some circumstances covered by the bill in which the relief which it would afford litigants may well be warranted, there are many others where it is more fitting that litigants be required to pursue their remedies under the Tort Claims Act or the Tucker Act.

The interests of the United States in the use of the waters of its river systems are so many and so varied that a full enumeration of them could not be made without a great deal of careful study. It is enough, I hope, for present purposes to exemplify these interests by pointing to those which it has under the commerce clauses of the Constitution; those which exist by virtue of the creation of Indian reservations under the doctrine of *United States v. Winters* (207 U. S. 564 (1908)) or by virtue of the creation of, for instance, a national park; those which it has asserted by entering into international treaties; those which it may have by virtue of its present and prior ownership of the public domain and which have not vested under the acts of July 26, 1866 (14 Stat. 253, 43 U. S. C. 661), July 9, 1870 (16 Stat. 218, 43 U. S. C. 661), and March 3, 1877 (19 Stat. 377, 43 U. S. C. 321); those with respect to which its officers and employees have followed the procedure prescribed in section 8 of the act of June 17, 1902 (32 Stat. 388, 43 U. S. C. 383); and those which it has acquired by purchase, gift, or condemnation from private owners. Since the United States can be said, with varying degrees of accuracy, to be the "owner" of rights of any or all these

types, it is clear to me that enactment of the bill could lead to a tremendous volume of unwarranted litigation and, in the absence of a complete and detailed catalogue of all the rights and interests which the United States has in the stream systems of the Nation, to the hazard that, by overlooking some, it would be forever precluded from asserting them thereafter.

The brief exemplification of some of the types of interests given above does, however, suggest an approach to the problem which, we believe, merits consideration. Subject to the qualifications noted in the next paragraph, it seems to me to be proper for the United States to permit itself to be joined as a party defendant, with a right of removal (as is now provided in the bill) to the Federal district court, wherever,

> (1) in the course of a judicial proceeding in a State court for a general adjudication of rights to the consumptive use of waters within that State it is made to appear to the court that the United States is a claimant of such right and is a necessary party to the proceeding; that the right is claimed for the direct benefit of persons who, if they were themselves the claimants, would be subject to the laws of that State with respect to the appropriation, use, or distribution of water; and that the right claimed by the United States exists solely by virtue of the laws of the State and is required, by a statute of the United States, to be established by an officer or employee thereof in accordance with said laws or has been or is being acquired by the United States from a predecessor in interest whose right depends upon its having been so established; or
>
> (2) judicial review is sought, as provided by State law, by a person adversely affected by and a party to a State administrative proceeding relating to the appropriation, use, or distribution of water invoked by a duly authorized officer or employee of the United States upon the outcome of which a right of the United States depends.

The qualifications spoken of above which should, I believe, be attached to such a waiver of immunity are these: (a) The waiver should in all instances be limited to an adjudication of those rights of the United States which depend solely upon their having been acquired pursuant to State law and should not extend to those that exist independently of such law or to those which have existed for a stated number of years (say, 6 years); (b) it should be limited to those claims which are made to appear with particularity in the papers upon the basis of which the court is moved to make the United States a party; (c) it should not extend to the granting of equitable relief against the United States or to the entering of a judgment for costs against it; (d) the United States should not in any way be prejudiced in the adjudication by the existence of a prior decree granted in any adjudication to which it was not lawfully made a party; (e) the waiver should not extend to rights asserted by the United States for or on behalf of Indians.

The Bureau of the Budget has advised that there is no objection to the submission of this report to your committee.

Sincerely yours,

MASTIN G. WHITE,
Acting Assistant Secretary of the Interior.

AUGUST 24, 1951.

Re S. 18.
Hon. PAT MCCARRAN,
Chairman Committee on the Judiciary,
United States Senate.

DEAR SENATOR: I am in agreement with the general purposes of S. 18. However, there is one possible implication in the bill that has caused me some apprehension and I take this means of achieving clarification before final action by our committee occurs.

It appears to me that section 1 of the bill—although I am sure that is not the intent—might make it possible to

block or delay a multiple-purpose development, such as proposed for the Hells Canyon project on the Snake River in the Columbia Basin.

I visualize the possibility of an individual or group, having water rights on that stream, bringing suit to adjudicate their respective rights—thereby preventing the Bureau of Reclamation from going ahead with the Hells Canyon project while litigation is in process or pending. Such action on the part of appropriators might be taken on their own initiative or might be stimulated by third parties who have been opposing this development.

A similar set of circumstances might prevail with respect to other streams in the Basin. I will appreciate the benefit of your best judgment as to whether S. 18 could be used in the manner I have described. I thing clarification on this point will be extremely useful if made a part of the legislative history of this bill.

I have another suggestion I respectfully submit for consideration of the committee. From all I can gather, there is no central place in the entire administrative branch of the Government where a catalog of water rights, to which the several agencies lay claim, has been assembled or is maintained. It appears to me it would be extremely helpful to the Attorney General to have access to an up-to-date list of the water rights he may be called upon to protect.

Accordingly, I am attaching a suggested new section for the bill and commend it to you for consideration before final action on S. 18 is taken.

Kindest personal regards.

Sincerely,

WARREN G. MAGNUSON, U. S. S.

AUGUST 25, 1951.

Hon. WARREN G. MAGNUSON,
United States Senate, Washington, D. C.

MY DEAR SENATOR MAGNUSON: I was very pleased to receive your letter of August 24, 1951, relative to S. 18, which provides for the joining of the United States in suits involving water rights where the United States has acquired or is in the process of acquiring water rights on a stream and is a necessary party to the suit.

I note that you raise the question that it might be possible to block or relay a multiple-purpose development, such as proposed for the Hells Canyon project on the Snake River in the Columbia Basin. You indicate that you visualize the possibility of an individual or group, having water rights on that stream, bringing suit to adjudicate their respective rights thereby preventing the Bureau of Reclamation from going ahead with the Hells Canyon project while litigation is in process or pending.

S. 18 is not intended to be used for the purpose of obstructing the project of which you speak or any similar project and it is not intended to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value. I agree with you that for purposes of legislative history, the report should show that S. 18 is not intended to be used for the purpose of obstructing or delaying Bureau of Reclamation projects for the good of the public and water users by the method of which you speak and in that connection I propose that such a statement be incorporated in the report and that this exchange of letters be attached thereto.

You further suggest an amendment to the bill relative to the cataloging of water rights to which the several agencies of the Government lay claim and with this suggestion

I am heartily in accord. I believe that such an amendment should be presented to the committee for its incorporation into S. 18.

I trust that the foregoing has served to clarify the situation as to your doubts.

Kindest personal regards.

Sincerely,

PAT MCCARRAN, *Chairman.*

S. Rep. No. 755, Part 2, 82nd Cong., 2nd Sess. (1952):

Mr. McCarran, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany an amendment to S.18 as reported]

Strike out section 1 as proposed to be amended beginning on page 1, line 3 down to and including line 18 on page 2 and insert in lieu thereof the following:

"That consent is hereby given to join the United States as a defendant in any suit, (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State Law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments,

orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided,* That no judgment for costs shall be entered against the United States in any such suit.

(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Nothing in this act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

Purpose

The purpose of the proposed amendment is to clarify the first committee amendment to S. 18 as reported by the Committee on the Judiciary on September 17, 1951.

Statement

It has come to the attention of the committee that there is a possible ambiguity in the language of section 1 of S. 18 as reported by the committee. The ambiguity consists in the following: The first sentence of the first proviso of section 1 is as follows:

> *Provided,* That nothing in this Act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

The second sentence of said first proviso is as follows:

> When the United States shall be a party to any such suit it shall be deemed to have waived any right to plead that the State laws are not applicable, or that the United States is not amenable thereto, by reason of the sovereignty of the United States, and the United States shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances.

It has been stated that the second sentence of the proviso may refer back to the first sentence and be restricted to suits of that category rather than to the first part of the section which authorizes the joining of the United States as a defendant in any suit as to the adjudication of rights to the water. While the committee does not believe that such is the case, in order to make the matter extremely clear the above amendment is offered.

It has been noted that the amendment to section 1 is in somewhat different form than section 1 appears at the present time, but it was felt that in order to convey a clearer meaning the form now submitted is better. The committee believes and is of the opinion that this amendment does not in any way change the effect of section 1 as reported but simply rearranges the language thereof so as to make the intent thereof clear and unmistakable.